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

and

MIRANDA MARIA BOWDEN
Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

DEFENDANT'S SUBMISSIONS

Part I:

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

Part II:

2. Division 4AA of the *Police Administration Act* (NT) permits a person who has been arrested in relation to one of a specified class of offences to be detained in custody for a period of up to four hours (or longer if he or she is intoxicated), following which he or she may be released unconditionally, released and issued with an infringement notice, released on bail, or brought before a justice or a court of competent jurisdiction. The issues arising in the matter are:

   (a) whether the doctrine of separation of powers at federal level implied from the text and structure of the Constitution effects a separation of the courts of the Northern Territory of Australia from its legislature and executive so as to preclude the Legislative Assembly of the Northern Territory from conferring judicial power on a Northern Territory body which is not a court or non-judicial power on a Northern Territory court;

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(b) whether Div 4AA confers an exclusively judicial function or power upon a body which is not a court and therefore infringes the doctrine of separation of powers under the Constitution; and

(c) whether Div 4AA impermissibly interferes with the institutional integrity of the courts of the Northern Territory contrary to the principle in *Kable v Director of Public Prosecutions (NSW)*[1] and is therefore invalid.

Part III:

3. The plaintiffs have given notices in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV:

4. The material facts are contained in paragraphs 1 to 11 and 30 of the Special Case filed on 10 June 2015 and recited in the Plaintiffs' Submissions and the Plaintiffs' Chronology. They are not contested.

Part V:

5. In addition to the constitutional provisions, statutes and regulations set out in Annexure A to the Plaintiffs' Submissions, the following statutes are applicable to the matters in issue.

- *Fines and Penalties (Recovery) Act* (NT), ss 9, 13, 21, 22
- *Criminal Code* (NT), s 106

These provisions are set out in Annexure A to these Submissions.

Part VI:

No Ch III separation of Northern Territory judicial and executive power

6. The *Police Administration Amendment Act 2014* (NT), which inserted Division 4AA into Part VII of the *Police Administration Act* (NT), and the latter Act are laws enacted by the Legislative Assembly of the Northern Territory pursuant to the power to make laws for the peace, order and good government of the Northern Territory conferred by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) (**SGA**). The SGA established the Northern Territory of Australia as a body politic under the Crown (s 5), the Legislative Assembly (s 13), the office of the Administrator (s 32) and the Executive Council of the Northern Territory comprising the persons for the time being holding Ministerial office (s 33); and conferred duties, powers, functions and authorities upon the Legislative Assembly and these other institutions. The constitutional validity of that grant of self-government has been confirmed.[2]

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1 (1996) 189 CLR 51.

2 *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators***) at 265-266 relying on *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 per Barwick CJ. The status of self-governing territories as separate bodies politic has also been confirmed:

7. The Legislative Assembly, as a legislature created to confer self-government upon a territory, is a body separate from the Commonwealth Parliament, and an exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power.[3] A long line of cases has established the principle that the legislature of a self-governing territory is not an agent or delegate of the superior legislature.[4]

8. The Legislative Assembly is vested with a plenary power to legislate on all subject matters relating to the Northern Territory, subject to certain qualifications which are not relevant for these purposes.[5] That legislative authority is of the same quality as that enjoyed by the legislatures of the States, and the constitution of the Northern Territory as a self-governing community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial statute.[6]

9. The doctrine of separation of powers in Australia is an implication flowing from the text, structure and scheme of the Constitution, and specifically the establishment of the federal judiciary in Ch III of the Constitution. It is concerned with the separation of the legislative and executive powers of the Commonwealth from the judicial powers of the Commonwealth, and is anchored in the notion that the power of the Commonwealth Parliament to vest any part of the judicial power of the Commonwealth is to be found exclusively in Ch III.[7] Its existence is mandated by the federal form of government (as distinct from a unitary system) in which the federal government is paramount within its rigidly defined powers, and which can only be carried into practical effect if the ultimate responsibility for deciding

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see, for example, *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; *Jennings Constructions v Burgundy Royale Investments* (1987) 162 CLR 153; *Svikart v Stewart* (1994) 181 CLR 548 (***Svikart v Stewart***); *Traut v Rogers* (1984) 70 FLR 17 at 19-20; *Northern Territory v Skywest Airlines* (1987) 90 FLR 270; *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345; *Waters v Acting Administrator for the Northern Territory* (1993) 46 FCR 462; *Wake and Gondarra v Northern Territory* (1996) 124 FLR 298.

3 *Svikart v Stewart* at 562 per Mason CJ, Deane, Dawson and McHugh JJ, and at 574 per Toohey J, citing *Capital Duplicators*. In *Capital Duplicators*, see 265-266 per Mason CJ, Dawson and McHugh JJ, 282 per Brennan, Deane and Toohey JJ, 284 per Gaudron J.

4 *The Queen v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co* (1885) 10 App Cas 282.

5 SGA, ss 49, 50(1), 53(5).

6 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279 per Wilson J, cited in *Capital Duplicators* at 281-282 per Brennan, Deane and Toohey JJ, and in *Svikart v Stewart* at 574 per Toohey J.

7 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270-271 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, citing *New South Wales v Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1; *The Queen v Davison* (1954) 90 CLR 353; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

upon the limits of the respective powers of the federation's governments is placed in the federal judicature.[8]

10. The doctrine has nothing to say about the separation of the legislative, executive or judicial powers of the States, except in the rare situations exemplified by *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***).[9]

11. For the doctrine to apply to the Northern Territory, it would have to be implied from the text, structure and scheme of the Constitution that the courts of self-governing territories are, or are to be treated as, federal courts within Ch III, rather than as either:

    (a) courts which exist outside the federation and outside the parameters of Ch III (ie the traditional "disparate" view of s 122[10]); or

    (b) courts of self-governing territories, which are to be treated, as far as possible, in the same manner as State courts for the purposes of Ch III, and which exercise both local "territory jurisdiction"[11] and such federal jurisdiction as may be invested by the Parliament.[12]

12. To determine whether there is such an implication in the Constitution, its text must be read in the light of the whole of the general law (which includes the common law and equity),[13] and the underlying historically-based assumptions about the courts, federal and State, upon which the judicial power of the Commonwealth can be conferred.[14] The rationale for the implication of the doctrine of the separation of powers into Ch III (as set out above) has no purchase in respect of the territories power in s 122. A Commonwealth territory is not of the paramount federal government and its courts do not hold the ultimate responsibility for deciding upon the limits of

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8 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268, 276 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

9 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 559 [63] per McHugh J, citing *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 441, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 273, and *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 539-540; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 66-67 per Brennan CJ, 77-78 per Dawson J, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598-599 [37] per McHugh J, 614 [86] per Gummow J, 655-656 [219] per Callinan and Heydon JJ; *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at 45 [66] per French CJ.

10 As expounded by Griffiths CJ in *The King v Bernasconi* (1915) 19 CLR 629 at 635 (Gavan Duffy and Rich JJ agreeing), and later upheld by the Privy Council in *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529 at 545. See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 62 per Dawson J, 176 per Gummow J.

11 That is, jurisdiction to determine controversies arising under laws passed by the legislature of a self-governing territory and/or the common law operating within a self-governing territory.

12 See Pauling T & Brownhill S, "Territories and Constitutional Change", (2007) 28 *Adelaide Law Review* 55.

13 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44-45 per Brennan J.

14 *Totani* at 37-38 [50] per French CJ.

the respective powers of federation's governments. If it is to have a position in the federation, it is more akin to the position of a State than to that of the federal government.

13. According to the "disparate" view of the territories power in s 122, territory courts are not "federal courts" within s 71 of the Constitution;[15] and on that view the doctrine of separation of powers under the Constitution does not apply to Northern Territory courts.[16]

14. The recent judicial moves away from the "disparate" view of the territories power towards a more "integrationist" view[17] have not held that territory courts are, or should be treated as, "federal courts". On the contrary, those decisions have held that:

    (a) territory courts can and do exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament;[18] and

    (b) courts of self-governing territories invested with federal jurisdiction are not courts "created by the Parliament" within s 72[19] and so not "federal courts" within s 71 of the Constitution.[20]

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15 See, for example, *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432 at 438 per Knox CJ and Gavan Duffy J, 440 per Isaacs J.

16 See, for example, *Kruger v Commonwealth* (1997) 190 CLR 1 at 62 per Dawson J. The plaintiffs appear to accept that territory courts are not federal courts: see Plaintiffs' Submissions, [25].

17 Including, most recently, *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 357 [80] per French CJ, 386 [183]-[184] per Gummow and Hayne JJ, 419 [286] per Kirby J, referred to in *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at 538 [7] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

18 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 (***Bradley***) at 163 [29]-[30] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Ebner v Official Trustee in Bankruptcy* (1999) 196 CLR 553 at 603-604 [81] per Gaudron J; *Re Governor Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 (***Eastman***) at 339-340 [33] per Gaudron J, 347-348 [62]-[63], 348-349 [66] per Gummow and Hayne JJ; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 595-596 [175] per Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing), 565 [82] per McHugh, 636 [312] per Callinan J; *Northern Territory v GPAO* (1999) 196 CLR 553 at 590-591 per Gleeson CJ and Gummow J (Hayne J agreeing), 605 per Gaudron J; *Kruger v Commonwealth* (1997) 190 CLR 1 (***Kruger***) at 84 per Toohey J, at 107, 109, 117 per Gaudron J, 162, 168, 176 per Gummow J. See also *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 543 [94] per Gageler J.

19 This is entirely consistent with the proposition that the exercise of legislative power by the legislature of a self-governing territory, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power: *Capital Duplicators* at 282 per Brennan, Deane and Toohey JJ, 284 per Gaudron J; *Svikart v Stewart* at 561-562 per Mason CJ, Deane, Dawson and McHugh JJ.

20 *Bradley* at 163-164 [31] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Eastman* at 332-333 [9] per Gleeson CJ, McHugh and Callinan JJ, at 340 [35]-[36] per Gaudron J, at 348 [63], 349 [67], 353 [81] per Gummow and Hayne JJ; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 (***Capital TV***); *Spratt v Hermes* (1965) 114 CLR 226 (***Spratt v Hermes***).

15. Accommodating territory courts within Ch III by recognising that they can be invested with federal jurisdiction pursuant to a law made under s 122 as "such other courts as [the Parliament] invests" within s 71 does not mandate that the doctrine of separation of powers applies to those courts, just as it does not do so for State courts.[21] The autochthonous expedient of conferring federal jurisdiction upon State courts (which the Parliament must take as it finds[22]), and now upon territory courts,[23] was possible "without misgiving" because of the integrity and impartiality of the High Court and other federal courts as prescribed by Ch III.[24] Compliance with the requirements of s 72 is the principal means by which that integrity and impartiality is assured, and central to the implication of the doctrine of separation of powers at federal level.[25] And, as has already been stated above, it is now beyond doubt that territory courts created by the legislatures of self-governing territories are not courts "created by the Parliament" within s 72. It must necessarily follow that the courts of self-governing territories – and the other institutions of government within those territories – are not subject to the doctrine. This is consistent with the broader constitutional proposition that the judiciary of a self-governing territory is not subject to the same constitutional provisions as the federal judiciary, and attaches to the self-governing body politic as an essential institution of self-government rather than attaching to the Commonwealth (as is also the case with the legislative and executive arms).[26]

16. The proposition that territory courts always and only exercise federal jurisdiction[27] is:

    (a) impossible to reconcile with the notion that territory courts are not federal courts within ss 71 and 72;

    (b) inconsistent with the conferral by s 67C(c) of the *Judiciary Act 1903* (Cth) upon the Supreme Court of the Northern Territory of the

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21 Cf Plaintiffs' Submissions, [28], where it is submitted that the Parliament cannot confer judicial power on anything other than a court specified in s 71.

22 *Totani* at 46 [67]-[68] per French CJ, citing *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide) v Alexander* (1912) 15 CLR 308 at 313 per Griffith CJ and *Le Mesurier v Connor* (1929) 42 CLR 481; *Forge v ASIC* (2006) 228 CLR 45 at 75 [61] per Gummow, Hayne and Crennan JJ.

23 By ss 67C and 68(2) of the *Judiciary Act 1903* (Cth), and by various Commonwealth legislative provisions which confer specific federal jurisdiction on territory courts.

24 *Totani* at 38-39 [51], 42-43 [61] per French CJ, citing at 38-39 [51] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 804.

25 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 469-470 per Isaacs and Rich JJ; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 13 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, citing *Harris v Caladine* (1991) 172 CLR 84 at 159 per McHugh J, at 139 per Toohey J.

26 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 278-280 per Wilson J, cited in *Capital Duplicators* at 281-282 per Brennan, Deane and Toohey JJ, and in *Svikart v Stewart* at 574 per Toohey J.

27 Plaintiffs' Submissions, [29].

jurisdiction which was conferred upon the Supreme Court of South Australia prior to the Territory's annexation to the Commonwealth in 1911, which included local jurisdiction akin to that exercised by State courts;

(c) reliant as it is on the words "in any matter...arising under any laws made by the Parliament" in s 76(ii) of the Constitution, difficult to reconcile, after the establishment of self-government, with the decisions in *Capital Duplicators* and *Svikart v Stewart*;

(d) inconsistent with the decisions in *Spratt v Hermes* and *Capital TV*,[28] as the plaintiffs appear to accept;[29] and

(e) inapt in its application to matters arising under the common law in a territory, notwithstanding reference to the provision made by the Parliament to establish a body of law in the territory,[30] such as s 7(1) of the *Northern Territory Acceptance Act 1910* (Cth), to the effect that all laws in force in the territory continue in force.[31]

17. The plaintiffs rely on the "general principle in Australian constitutional law" that the stream cannot rise above its source.[32] Reference to the principle in

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28 As acknowledged by Gummow J in *Kruger* at 170. To the extent that *Spratt v Hermes* and *Capital TV* appear contrary to the proposition that territory courts can have a place in Ch III akin in most respects to those of the States, the view that has been implicitly adopted since those cases were decided is that just as a Commonwealth law which vests in a State court jurisdiction to hear and determine a matter arising under a Commonwealth law is a law investing that court with "federal jurisdiction" within the meaning of s 77(iii) of the Constitution, a Commonwealth law which vests in a Territory court jurisdiction to hear and determine the same matter arising under the same Commonwealth law ought also be characterised as a law investing that court with "federal jurisdiction": see *Northern Territory v GPAO* (1999) 196 CLR 553 at 605 [131] per Gaudron J, endorsed in *Eastman* at 348 [63] per Gummow and Hayne JJ and *Bradley* at 162-163 [27]-[28] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

29 Plaintiffs' Submissions, [30].

30 Cf *Kruger* at 168-169 per Gummow J; *O'Neil v Mann* (2000) 101 FCR 160 at 167-168 [26]-[30] per Finn J; Zelmen Cowen and Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed), 2002, pp 183-185; Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2012, pp 25-26.

31 In *Gumana v Northern Territory* (2007) 158 FCR 349, the Full Court of the Federal Court expressed the view that the common law cannot properly be said to be one of the "existing laws" of the Northern Territory continued in force by s 57 of the SGA. This is consistent with the established principle that whenever political jurisdiction and legislative power over a territory are transferred from one nation or sovereign to another, the municipal laws of the territory, including the common law, continue automatically in force until altered by the new sovereign: *Buchanan v Commonwealth* (1913) 16 CLR 315 at 324 per Barton ACJ, 333-334 per Isaacs (Gavan Duffy and Rich JJ agreeing); *R v Phillips* (1970) 125 CLR 93 at 124-125 per Walsh J. Further, the common law would have continued in any territory surrendered to, and accepted by, the Commonwealth without any legislative continuance, because the common law is one law applying to the whole of Australia: *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 556, 562-566 per curiam; *Lipohar v The Queen* (1999) 200 CLR 485 at 500 per Gleeson CJ, 505-510 per Gaudron, Gummow and Hayne JJ, 551-552 per Kirby J.

32 Plaintiffs' Submissions, [28].

this context is misplaced.[33] The legislative power of the Parliament conferred by s 122 is a plenary power to make laws for the government of any territory,[34] and a plenary power is conferred on the Northern Territory legislature by s 6 of the SGA. The principle says nothing about the operation of s 122 in the context of Ch III.

18. The power of the Legislative Assembly to establish courts, including the Supreme Court, and to confer power on them lies entirely in its general grant of legislative authority, which is "relevantly unconfined".[35] The Northern Territory has established a number of courts and tribunals which exercise both judicial and non-judicial functions.[36] It has done so on the basis of a view that the doctrine of separation of powers has no application in territories.[37] To conclude that the doctrine of separation of powers operates in the Northern Territory will invalidate the decisions of those courts and tribunals.[38]

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[33] The metaphor is directed to a principle against the delegation or abdication of legislative power which denied to the legislature power to determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power. See *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640 per Gibbs CJ, Wilson, Dean and Dawson JJ, citing *Deputy Commissioner v Hankin* (1959) 100 CLR 566 at 576-577, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 258 per Fullagar J and *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 40 per Dixon CJ and at 52 per Williams J. See also *MacCormick* at 646 per Murphy J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 237 [220] per Gummow J, 277 [335] per Hayne and Callinan JJ

[34] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 347-348 [55], [57] per French CJ; *Capital Duplicators* at 271-272 per Brennan, Deane and Toohey JJ, 284 per Gaudron J.

[35] *Eastman* at 351-352 [78] per Gummow and Hayne JJ. Although that observation was made in respect of the legislative authority of the Australian Capital Territory, it applies *a fortiori* to the legislative authority of the Northern Territory, which is not subject to limitations expressed in ss 48A, 48B and 48D of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

[36] Courts include the Local Court (see the *Local Court Act*, the *Small Claims Act*, the *Care and Protection of Children Act*), the Court of Summary Jurisdiction (see the *Justices Act*, Part IV, Division 1), the Work Health Court (see the *Work Health Administration Act* and the *Return to Work Act*), the Youth Justice Court (see the *Youth Justice Act*). Tribunals include the Alcohol Mandatory Treatment Tribunal (see the *Alcohol Mandatory Treatment Act*), the Northern Territory Civil and Administrative Tribunal (see the *Northern Territory Civil and Administrative Tribunal Act*), the Lands, Planning and Mining Tribunal (see the former *Lands, Planning and Mining Tribunal Act*), the Northern Territory Licensing Commission (see the former *Northern Territory Licensing Commission Act* and the *Liquor Act*), the Agents Licensing Board (see the *Agents Licensing Act*).

[37] See, for example, *Highway v Tudor-Stack* (2006) 18 NTLR 58 at 62 [13] per Mildren J (Martin CJ and Thomas J agreeing); *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39 at 115 [237] per Mildren J; *Fittock v The Queen* (2001) 11 NTLR 52 at 58 [12] per Angel, Mildren and Riley JJ. In the Australian Capital Territory, see *Lewis v Chief Executive of the Department of Justice and Community Safety* (2013) 280 FLR 118; *Jacka v ACT and Chief Executive of the Department of Justice and Community Safety* [2013] ACTSC 199; *Merrilees v The Queen* [2014] ACTCA 10.

[38] See Kable at 66-67, where Brennan CJ noted that the doctrine of separation of powers does not purport to effect a separation of the courts of a State or Territory from the legislature or executive of the State or Territory, as that would result in the destruction of laws conferring non-judicial power on courts in those jurisdictions (and, conversely, laws conferring judicial functions on executive bodies).

19. To imply from Ch III that the doctrine of separation of powers applies to the territories power in s 122 is not consistent with the nature and purpose of the power which s 122 confers. The power is plenary and should be relatively unconfined so that it is capable of exercise in relation to territories of varying size and importance which are at different stages of political and economic development, and wide enough to permit, on the one hand, the passing of laws providing for the direct administration of a territory by the Australian government without separate territorial administrative institutions or a separate fiscus, and, on the other hand, to enable the Parliament to endow a territory with separate political, representative and administrative institutions, having control of its own fiscus.[39] To maximize flexibility, the Parliament must be free to make whatever arrangements it wishes in respect of a territory judiciary, including both legislating for and maintaining control over the judiciary, and completely transferring control and administration of the judiciary to a separate territory politic under its own legislation.

20. In any event, a separate and self-governing body politic like the Northern Territory is as close as a territory can be to a State. It should be accepted, as far as possible, as having a place in the "integrated legal system" and "single system of jurisprudence" created by the Constitution[40] which aligns with those of the States, thereby smoothing the way for its transition to Statehood in due course. Imposition of the doctrine of separation of powers, particularly at this stage of its constitutional development, would be obsolescent and debilitating.

21. That alignment leaves undisturbed the limitations imposed on the exercise of Commonwealth legislative power by the doctrine of separation of powers, and leaves the Legislative Assembly bound by the doctrine in *Kable* in order to safeguard the institutional integrity of Northern Territory courts which may be invested with federal jurisdiction.

Section 133AB detention is not a judicial function

22. It is unnecessary to decide, in this matter, whether the *dictum* in the judgment of Brennan, Deane and Dawson JJ in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) (at 27-28) stands as authority for a presumption or starting point to the effect that a law for the involuntary detention of a citizen is penal or punitive in character and therefore judicial in nature.[41]

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[39] *Berwick v Gray* (1976) 133 CLR 604 at 607 per Mason J (Barwick CJ, McTiernan and Murphy JJ agreeing).

[40] *Kruger* at 175 per Gummow J, citing *Theophanous* (1994) 182 CLR 104 at 141, *Kable* (1996) 189 CLR 51 at 102-104, 111-116, 137-140, and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

[41] See *Kruger* at 110 per Gaudron J; *Re Wooley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24-26 [57]-[60] per McHugh J; *Al-Kateb v Goodwin* (2004) 219 CLR 562 at 648 [257]-[258] per Hayne J; *Plaintiff M76 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 370 [140]-[141] per Crennan, Bell and Gageler JJ. Cf Plaintiffs' Submissions, [31]-[32].

23. For the reasons set out below, detention of a person as prescribed by s 133AB of the *Police Administration Act* (NT) (**PAA**) is within one of the qualifications accepted in *Lim* (at 28) to the more general proposition that the power to require a citizen to be involuntarily detained in custody is judicial. As accepted in *Lim*, the arrest and detention in custody, pursuant to executive warrant but ordinarily subject to the supervisory jurisdiction of the courts, of a person accused of crime to ensure that they are available to be dealt with by the courts is not punitive and does not appertain exclusively to judicial power.

24. The operation and effect of Div 4AA of the PAA must be understood in the context of the language and structure of Part VII of which it forms part. This follows as much from general principles of statutory interpretation[42] as from the specific interaction between Div 4AA and other provisions of Part VII, most notably s 123 and ss 137-138, found in Div 2 and Div 6 of Part VII respectively.

25. Section 123 authorises the arrest and taking into custody without warrant of a person reasonably suspected of having committed, committing or being about to commit an offence. Such an arrest enlivens the operation of both s 137 and, in the case of "infringement notice offences", s 133AB.

26. By s 137(1), a person taken into lawful custody under the PAA or any other Act shall be brought before a justice or a court of competent jurisdiction. That requirement is not affected by the power conferred by s 137(2) and (3), which only affects the requirement in s 137(1) to do so as soon as is practicable after being taken into custody, unless sooner granted bail under the *Bail Act* or released from custody. In its terms, s 137 applies to persons arrested and taken into custody under s 123 and taken into custody under s 133AB. The words of s 137(1) are broad, extending to a person taken into lawful custody under the PAA or any other Act. Section 136, addressing the application of Div 6 (ss 136-138B), excludes a person held in custody under Div 4 (ss 127A-133) but does not exclude a person held in custody under Div 4AA.

27. By its terms, s 133AB "applies if" a person was arrested under s 123 because the arresting member believed on reasonable grounds that the person had committed, was committing, or was about to commit an infringement notice offence (s 133AB(1)). There is no election on the part of the arresting member as to whether to detain the arrested person under one or the other of s 133AB or s 137.

28. Section 133AB permits the arresting member to hold the person in custody for "a period *up to* 4 hours" or "a period longer than 4 hours" if the person is

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42 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1924) 35 CLR 449 at 455 per Isaacs and Rich JJ; *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 at 514 per Mason J.

intoxicated (s 133AB(2)).[43] The section provides that "on the expiry of the period" in s 133AB(2), a member may deal with the person in one of four ways, three of which are also expressly referred to in s 137(1), including to bring the person before a justice or a court "under section 137" (s 133AB(3)). The fourth way in which such a person may be dealt with is to be released and issued with an infringement notice in relation to the infringement notice offence for which the person was arrested (s 133AB(3)(b)). The reference in s 137(1) to "release from custody" is not qualified by the word "unconditionally" or like term, such that this fourth option also falls within s 137. This construction appears to be accepted by the plaintiffs.[44]

29. Consequently, the detention of a person falling within s 133AB is subject to the provisions of s 137. The overarching requirement in s 137 – to bring a person before a justice or a court unless otherwise bailed or released – constrains, and defines the purpose of, the detention.[45] That requirement alone goes a considerable way to bringing the detention within the qualification expressed in *Lim* of ensuring that a person arrested and detained accused of crime is available to be dealt with by the courts.

30. Further, the requirement in s 137 to do so as soon as is practicable after being taken into custody confines, and will invariably include[46], the period of *up to* four hours prescribed by s 133AB(2)(a). Similarly, the overarching requirement to charge and bring an intoxicated person before a justice or a court as soon as is practicable after it reasonably appears that they are no longer intoxicated in s 138A constrains, and will at least equate with, the period prescribed by s 133AB(2)(b).

31. The period prescribed by s 133AB(2) is for the purpose of deciding how to deal with the person, and includes for that purpose power to question them about the offence for which they were arrested or any other offence in relation to which the person is of interest to police (s 133AB(4)).[47] But that

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43 Cf Plaintiffs' Submissions, [44], [45], [46], [47], [48], [49], [50], which all refer to a detention period of four hours.

44 Plaintiffs' Submissions, [43(c)(iii)].

45 See also s 106 of the *Criminal Code* (NT) which creates an offence of delaying in bringing a person arrested before the courts.

46 It should be inferred from the enactment of Division 4AA, and the references in the Second Reading Speech to the procedure in s 133AB as allowing Police to deal "more expeditiously" and in a "more timely fashion" with a person in custody than if they are charged and bailed or charged and brought before a court, that, generally speaking, the period in which it is practicable to charge a person and bring them before a justice or a court takes more than four hours. Support for this inference is found in the authorities which have considered the duration of "a reasonable period" within s 137(2) of the PAA (albeit in respect of offences of a more serious nature than those falling within Div 4AA). See *R v CS* [2012] NTSC 94 at [39] per Barr J; *R v Collett* [2011] NTSC 87 at [24]-[25] per Kelly J; *R v Cotchilli* [2007] NTSC 52 at [19]-[36] per Mildren J; *R v Grimley* [1994] NTSC 64 at [102] per Kearney J; *Heiss v The Queen*; *Kamm v The Queen* (1992) 2 NTLR 150.

47 This power to question, for that specified purpose, in respect of those specified offences, and within the period prescribed, is now additional to the power to question identified in s 137(2) and (3). The addition of a power to question in these circumstances does not alter the character or the purpose of the detention, or the overarching requirement of s 137(1) to bring the person before a justice or a court.

does not deny the operation (as set out above) of the overarching purpose of the detention identified by s 137(1).

32. Prior to the passage of s 133AB, there was no prescription of the time within which a decision had to be made about how a person in custody was to be dealt with, outside of s 137. There is no basis for concluding that decisions about how a person in custody should be dealt with were to be made (in the absence of s 133AB) immediately upon, or prior to, a person being taken into custody. It follows that there is no basis for concluding that the period in s 133AB(2) is "superadded".[48] To construe the provisions that way in support of an argument that they invalidly confer judicial power is inconsistent with the fundamental principle of legality,[49] particularly that aspect which requires legislation to be construed, so far as its language permits, so as to be within power.[50]

33. Division 4AA provides expressly that a person who has been arrested and taken into custody in respect of one of a specified class of offences[51] may be released and issued with an infringement notice, if that occurs within a specified period of time. The issue of an infringement notice permits a person who has committed a specified offence to expiate the offence by paying the penalty specified in the notice,[52] and upon such payment the alleged offence is expiated and no further proceedings can be taken in relation to the offence;[53] but the person may elect to have the matter dealt with by a court[54] and, if so, proceedings in respect of the alleged offence may be taken as if an infringement notice had not been issued.[55] It follows that issuing an infringement notice does not remove the courts from the criminal

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48 Plaintiffs' Submissions, [45], [46], [49]. Cf also the Proposed Submissions of the Australian Human Rights Commission Seeking Leave to Intervene (Annotated) filed on 13 July 2015 (**AHRC Submissions**), [60], [67].

49 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-329 [19]-[21] per Gleeson CJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

50 *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 180 per Isaacs J; *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 267 per Dixon J; *Lim* at 14 per Mason J. See also s 59 of the *Interpretation Act* (NT); *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 161-162 [355] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ; *Totani* at 28 [31] per French CJ; *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 519-520 [46]-[47] per French CJ.

51 A power which existed prior to the insertion of Div 4AA, regardless of whether those offences prescribed a maximum penalty of imprisonment or not.

52 *Fines and Penalties (Recovery) Act* (NT), s 9.

53 Ibid, s 13.

54 Ibid, s 21.

55 Ibid, s 22.

process,[56] and that an arrest and detention which culminates in the issue of a notice is nevertheless within the qualification identified in *Lim*.

34. Division 4AA was inserted because of a perception that the power to arrest and detain under ss 123 and 137 did not permit a person so arrested and detained to be released and issued with an infringement notice.[57] Given the observations of this Court in *Williams v The Queen* (1986) 161 CLR 278 and the authorities cited therein to the effect that any legislative intrusion into the common law's stringent protection of the right to personal liberty must be clear and unambiguous, such a perception was not unreasonable.

35. The plaintiffs' assertion that detention for a "superadded period of four hours" is not reasonably capable of being seen as necessary for any identifiable non-punitive purpose[58] must be rejected for the following reasons.

36. First, for the reasons outlined above, on a proper construction of the provisions there is no superadded period of four hours.

37. Secondly, the purpose of detention is unchanged by the amendments. Both before and after the amendments, arrest and detention was and is to ensure that persons accused of offending are dealt with by the courts (notwithstanding the option to expiate their offending by payment of a fine).

38. Thirdly, the detention remains constrained by the requirement in s 137 to bring the person before a justice or a court as soon as practicable.

39. Fourthly, the proper exercise of the power of arrest pursuant to s 123 limits the circumstances in which Div 4AA operates to those where arrest is appropriate having regard to the need to:

    (a) ensure the person is available to be dealt with in respect of an offence if considered appropriate;[59]

    (b) preserve public order;[60]

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[56] Notwithstanding any statements which might suggest a contrary understanding or intention expressed in the Second Reading Speech. It is the words of the statute, and not non-statutory words seeking to explain them in the Second Reading Speech, which have paramount significance: *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ, at 555-556 [82]-[84] per Kirby J, cited in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ and *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99] per Crennan J (Heydon J agreeing). Cf Plaintiffs' Submissions, [47].

[57] Second Reading Speech, Police Administration Amendment Bill, 21 October 2014, Attorney-General and Minister for Justice.

[58] Plaintiffs' Submissions, [50]-[51]. See also AHRC's Submissions, [63]-[64], [69]-[73].

[59] See the discussion in *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151 concerning the circumstances in which the exercise of police powers of arrest is appropriate. See also *Fleet v District Court* [1999] NSWCA 363; *Director of Public Prosecutions (NSW) v CAD* [2003] NSWSC 197 at [7] per Barr J.

(c) prevent the completion, continuation or repetition of the offence or the commission of another offence;[61]

(d) prevent the concealment, loss or destruction of evidence relating to the offence;

(e) prevent the harassment of, or interference with, persons in the vicinity;

(f) prevent the fabrication of evidence in respect of the offence; and/or

(g) preserve the safety or welfare of the public or the person detained.[62]

40. Fifthly, detention for those purposes for a period of up to four hours or until a person ceases to be intoxicated cannot properly be characterised as for a punitive purpose in the context and circumstances.[63]

41. Sixthly, and in any event, the requirement in *Lim* for the detention to be reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered[64] arose because the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for their explusion or deportation by the executive, but also extends to authorizing the executive to restrain an alien in custody *to the extent necessary to make the deportation effective*.[65] Such questions, essentially of proportionality or necessity of the detention to its legislatively permissible purpose, do not arise in the context of non-purposive heads of legislative power,[66] as in the case of a plenary legislative authority.[67] Unless, perhaps, it be shown that the detention is an abuse for an illegitimate purpose,[68] the assessment of proportionality or necessity is one of a political, rather than a

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60 *Donaldson v Broomby* (1982) 5 A Crim R 160 at 161 per Deane J (Kelly J agreeing). See also s 5 of the PAA, which contains the same core functions of the Police Force.

61 *Ibid*.

62 *Ibid*.

63 In *Lim* (at 33), the period of detention permitted by the legislation was a maximum of 273 days, plus time during events beyond the control of the Department, and which could have applied to persons who had already been unlawfully held in custody for years.

64 At 33 per Brennan, Deane and Dawson JJ.

65 *Lim* at 30-31 per Brennan, Deane and Dawson JJ. See also *Plaintiff M76 of 2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 370 [140] per Crennan, Bell and Gageler JJ.

66 *Leask v Commonwealth* (1996) 187 CLR 579 at 593-595 per Brennan CJ, at 602-603 per Dawson J, at 616-617 per McHugh J, at 624 per Gummow J; *Theophanous v Commonwealth* (2006) 225 CLR 101 at [70] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

67 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 541 [80] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

68 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 654 [217] per Callinan and Heydon JJ.

legal, nature.[69] Furthermore, the validity of the conferral of a statutory power is not to be tested by reference to extreme examples and distorting possibilities.[70]

Kable

42. This Court's decision in *Kable* and subsequent authorities explaining and refining its principal rationale establish that a State or Territory legislature cannot confer upon a State or Territory court a function which substantially impairs, or which is incompatible with or repugnant to, the institutional integrity of the court and its role under Ch III of the *Constitution* as a repository of federal jurisdiction and as part of the integrated Australian court system.[71]

43. A court's institutional integrity will be impaired in the relevant sense where:

    (a) the legislation in question directly enlists the court in the implementation of the legislative or executive policies of the State or Territory concerned;[72] or

    (b) the legislation in question requires the court to depart to a significant degree from the methods and standards which have historically characterised the exercise of judicial power.[73]

44. Division 4AA of the PAA does not enlist any court in the implementation of policy, nor does it alter the methods and standards which have characterized the exercise of judicial power. It does not fall within the established scope of the principle in *Kable*.

45. The plaintiffs concede that *Kable* has not previously been applied to invalidate legislation which removes some jurisdiction from the courts.[74] The

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69 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 541-542 [85] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, citing *Magaming v The Queen* (2013) 252 CLR 381 at 414 [108] per Keane J.

70 *Forge v ASIC* (2006) 228 CLR 45 at 69 [46] per Gleeson CJ, citing *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ. Cf AHRC's Submissions, [67], [69].

71 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 533 [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44]-[45] per French CJ and Kiefel J, 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ; *Totani* at 47 [69] per French CJ, 82 [205], 83 [212] per Hayne J, 157 [426] per Crennan and Bell.

72 *Kuczborski v Queensland* (2014) 89 ALJR 59 at 88 [140] per Crennan, Kiefel, Gageler and Keane JJ; *Totani* at 52 [82] per French CJ, 67 [149] per Gummow J, 92-93 [236] per Hayne J, 173 [481] per Kiefel J.

73 *Kuczborski v Queensland* (2014) 89 ALJR 59 at 88 [140] per Crennan, Kiefel, Gageler and Keane JJ; *Totani* at 62-63 [131] per Gummow J, 157 [42] per Crennan and Bell JJ; *International Finance Trust Co v New South Wales Crime Commission* (2009) 240 CLR 319 at 353-354 [52] per French CJ; *Thomas* v *Mowbray* (2007) 233 CLR 307 at 355 [111] per Gummow and Crennan JJ; *Forge* v *ASIC* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

74 Plaintiff's Submissions, [55].

proposition that the principle in *Kable* should be extended to such circumstances is not supported by the essential rationale of the doctrine, which is to preserve the integrity of the institutions identified by Ch III as having federal judicial responsibility. It is also inconsistent with the principle in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (at 581 [100]) that the limit on State (and Territory) legislative power to constrain the supervisory jurisdiction of the Supreme Courts is governed by the concept of jurisdictional error.

46. However, it is unnecessary for the Court to determine these issues in this proceeding.[75] For the reasons articulated at paragraphs 22 to 33 above, Div 4AA does not involve an exercise of judicial power, and does not usurp or remove the jurisdiction of any court. Specifically, Div 4AA does not:

(a) prevent or impede the arrested person's access to the courts; or

(b) eviscerate the court's supervisory power in relation to the detention.[76]

Conclusion

47. The questions posed by the Special Case should be answered as follows:

Question 1(a): No.

Question 1(b): No.

Question 2: The plaintiffs should pay the defendant's costs of the special case.[77]

Question 3: The proceeding is dismissed.

Part VII:

48. There is no notice of contention or notice of cross-appeal.

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75 If so, consistently with settled practice, the Court should not decide the issues: *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28] per McHugh, Gummow, Hayne and Heydon JJ.

76 Cf Plaintiffs' Submissions, [56]. Cf also AHRC Submissions, [63].

77 While the proceeding involves the personal liberty of the second plaintiff and other "public interest aspects", and the "baroque complexities" of the relationship between Ch III and territories, the second plaintiff seeks to benefit financially from the claims she makes thereunder, and at its base the proceeding is founded upon a misconstruction of the effect and operation of Div 4AA of the PAA. The usual rule as to costs should be applied. See *City of South Melbourne v Hallam (No 2)* (1994) 83 LGERA 307; *North Australian Aboriginal Legal Aid Service v Bradley* (2002) 122 FCR 204; *Cabal v United Mexican States (No 6)* (2000) 113 A Crim R 227, cited in *Ruddock v Vadarlis* (2001) 110 FCR 491 at [24]; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

Part VIII:

49. It is estimated that the presentation of the defendant's oral argument concerning the issues traversed in these submissions will take two hours.

Dated: 6 August 2015

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ANNEXURE A

FURTHER APPLICABLE PROVISIONS

Except where noted, Annexure A sets out the applicable regulatory provisions in force at all relevant times and still in force in the form set out in this annexure at the date of making the defendant's submissions.

A. *FINES AND PENALTIES (RECOVERY) ACT* (NT)

Division 2 Infringement notices

9 Infringement notice

An infringement notice is a notice issued under a law of the Territory to the effect that the person to whom it is directed has committed a specified offence and that the person may expiate the offence by paying the penalty specified in the notice in the manner and within the time specified.

13 Payment of amount required by infringement notice

If the penalty under an infringement notice is paid within the period specified in the notice, or the further time allowed under section 12B, the alleged offence is expiated and no further proceedings can be taken in relation to the offence unless the notice is withdrawn in accordance with the law under which the infringement notice was issued.

Division 4 Election to be dealt with by court

21 Alleged offender may elect to have matter dealt with by court

(1) A person who is alleged or is to be taken to have committed the offence to which an infringement notice relates may elect to have the matter dealt with by a court instead of under this Act.

(2) The election is to be made by serving on the enforcement agency or other person or body specified in the infringement notice or the courtesy letter, if issued, a written statement that the person so elects.

(3) The statement may be served at any time (including before a courtesy letter is issued) but, if a courtesy letter has been served on the person in relation to the relevant infringement notice, the statement is to be served before the due date specified in the courtesy letter.

(4) The statement is to contain the prescribed information and may be served personally, by post, by facsimile transmission or in any other manner prescribed by the Regulations.

22 Matter to proceed

(1) If a person elects in accordance with section 21 to have the matter dealt with by a court, proceedings against the person in respect of the alleged offence may be taken as if an infringement notice or a courtesy letter had not been issued.

(2) The proceedings mentioned in subsection (1) must be commenced as follows:

(a) if, apart from this subsection, proceedings for prosecuting the offence would be required to be commenced within a period of 12 months or less after the offence is alleged to have been committed – within 12 months after the offence is alleged to have been committed;

(b) otherwise – before the expiry of the period within which the proceedings must be commenced.

B. *CRIMINAL CODE* (NT)

106 Delay in taking person arrested before court

Any person who, except as permitted by law, having arrested another, deliberately delays bringing him before a court to be dealt with according to law is guilty of a crime and is liable to imprisonment for 2 years.