

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY
LIMITED & ANOR v NORTHERN TERRITORY OF AUSTRALIA
(M45/2015)

Date Special Case referred to Full Court: 3 June 2015

This special case challenges the validity of Division 4AA of Part VII of the *Police Administration Act* 2014 (NT) ('the PA Act') which commenced operation on 17 December 2014. The new powers apply where a member of the police force arrests a person without a warrant and does so believing on reasonable grounds that the person has committed, was committing, or was about to commit an "infringement notice offence". Some 35 different offences fall within this class. The majority are minor offences for which no term of imprisonment could be imposed as a penalty for the offence, if the person were found guilty by a court. Many are of a "public order" character. The new powers purport to authorise police to take a person into custody and hold the person for a period of up to four hours or, if the person is intoxicated, for a period longer than four hours, until the member believes on reasonable grounds that the person is no longer intoxicated.

The first plaintiff provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. It alleges that a disproportionately high number of people detained under s 133AB of the PA Act since it came into effect are indigenous. The second plaintiff was arrested and taken into custody purportedly pursuant to s 133AB(2)(b) of the PA Act on 19 March 2015 and was held in custody for almost 12 hours.

The plaintiffs filed a writ of summons challenging the validity of the legislation and Nettle J, on 3 June 2015, referred the Special Case agreed by the parties to the Full Court. The issues arising are: (a) does the separation of powers enshrined in Chapter III of the Commonwealth Constitution limit the legislative power of the Parliament under s 122 of the Constitution? If so, does it limit the legislative power of the Legislative Assembly of the Northern Territory ('the NT') because the stream cannot rise higher than its source? And if so, do the impugned provisions contravene the separation between judicial and executive powers; and (b) do the impugned provisions (by effectively removing from judicial oversight the involuntary detention of a citizen) undermine the institutional integrity of the courts of the NT contrary to the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 5?

The Plaintiffs submit that the new powers conferred on NT Police are unprecedented in Australia and in the common law world. In comparing these NT powers to existing powers in other jurisdictions, two features are striking: first, Div 4AA purports to authorise a period in custody of up to four hours without any requirement even that the time be used for the purpose of investigating an offence; and secondly, Div 4AA fails to provide for judicial oversight of the process. The Plaintiffs contend that because detention under Div 4AA lacks any non-punitive purpose, and because it cannot be regarded as being reasonably capable of being considered necessary for any such purpose, the detention which that Division authorises can only be an incident or result of a judicial order or warrant. Division 4AA purports to allow this detention at the instance of the Executive without judicial order or warrant. It is therefore invalid for conferring judicial power on the Executive rather than on a court as required by s 71 of the Constitution.

The Defendant submits that the doctrine of the separation of powers in Chapter III of the Constitution does not apply to the Northern Territory. It further contends that detention of a person as prescribed by s 133AB of the PA Act is within one of the qualifications accepted in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 to the more general proposition that the power to require a citizen to be involuntarily detained in custody is judicial.

The Attorneys-General of the Commonwealth, New South Wales, South Australia, Western Australia, Queensland and the Australian Capital Territory have given notice that they will intervene. An application for leave to intervene has been filed by the Australian Human Rights Commission.

The questions reserved by the Special Case signed by the parties include:

- Is Division 4AA of Part VII of the *Police Administration Act* 2014 (NT) (or any part thereof) invalid on the ground that:
 - (a) it purports to confer on the executive of the Northern Territory a power to detain which is penal or punitive in character:
 - a. which, if it had been passed by the Commonwealth Parliament, would be beyond the powers of that Parliament under s 122 of the Constitution, which powers are limited by the separation of powers enshrined in the Constitution; and
 - b. which is therefore beyond the powers of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth), which powers are subject to the same limits; and/or
 - (b) it purports to confer on the executive (rather than the courts) of the Northern Territory a power of detention which is penal or punitive in character, thereby undermining or interfering with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution?