IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No M45 of 2015

BETWEEN **NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED**
First Plaintiff

and **MIRANDA MARIA BOWDEN**
Second Plaintiff

and **NORTHERN TERRITORY OF AUSTRALIA**
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney General for New South Wales ("NSW") intervenes under s. 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III: Why leave to intervene should be granted

3. Leave to intervene is not required.

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Part IV: Constitutional and legislative provisions

4. NSW accepts the plaintiff's statement of applicable provisions, as supplemented by the defendant.

Part V: Argument

Summary of argument

5. NSW seeks to be heard only on the question of whether Division 4AA of the Police Administration Act (NT) ("PAA") infringes the principle in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable").

6. The Kable principle applies to the legislation enacted by the Northern Territory legislature: Attorney General (NT) v Emmerson (2014) 88 ALJR 522. However, the Kable principle does not imply into the Territory's constitution the separation of judicial power that is required for the Commonwealth by Ch. III of the Constitution. Rather, the principle for which the Kable stands is that a State or Territory legislature cannot confer upon a court a power or function which substantially impairs the court's institutional integrity. For this reason, a State or Territory law will only contravene Kable if it invests a function in a State or Territory court that is "repugnant to" or "incompatible with" the exercise of federal jurisdiction by the State or Territory court.

7. Division 4AA of the PAA does not invest any power or function in a Territory court. Rather, Div. 4AA confers functions on police officers, who form part of the executive. The powers conferred on police officers by Div. 4AA do not substantively differ from the uncontentious power of police officers to arrest an offender for an offence prior to the enactment of that Division. The PAA does not preclude the court from reviewing the exercise of executive power (either in habeus corpus or judicial review proceedings, or in an action for false imprisonment). Accordingly, Div. 4AA is valid.

The Kable principle

8. It is now well established that the Parliaments of the States and Territories may not legislate to confer powers on State or Territory courts which are repugnant to, or incompatible with their exercise of the judicial power of the Commonwealth:

Pollentine v Bleijie (2014) 88 ALJR 796 at [42], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; Kuczborski v Queensland (2014) 89 ALJR 59 at [139], per Crennan, Kiefel, Gageler and Keane JJ; Emmerson at [40], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; Wainohu v New South Wales (2011) 243 CLR 181 at [44]-[45], per French CJ and Kiefel J, at [105], per Gummow, Hayne, Crennan and Bell JJ; South Australia v Totani (2010) 242 CLR 1 at [69], per French CJ, [212], per Hayne J, [426], per Crennan and Bell JJ; International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319 at [56], per French CJ, [98] per Gummow and Bell JJ, [140] per Heydon J, Kable at 100 – 104, per Gaudron J, at 109 -115, per McHugh J and at 140-143, per Gummow J.

9. The Kable principle has been applied by this Court to invalidate State legislation where the legislation:

(a) authorised the State court to order the preventative detention of a specified individual without any breach of the law being alleged or there being any adjudication of guilt (Kable);

(b) required the State court to receive, hear and determine an ex parte application for the sequestration of property, upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure (IFTC);

(c) directed a State court to make a control order against a person where the court was satisfied of one matter, namely whether the person was a member of a "declared organisation" (Totani); and

(d) enlivened the jurisdiction of the State court to make a control order against a member of an organisation by a decision of a judge of the State court, after an adversarial proceeding for which the legislation provided that no reasons need be given (Wainohu).

10. In each of the above cases, the vice of the legislation in question was the conferral of powers or functions on a State court which were "incompatible with" or "repugnant to" the investiture of the State court with federal jurisdiction. For example, in IFTC, French CJ said that the legislation "direct[ed] the court as to the manner of the

exercise of its jurisdiction" (at [56]), whilst Gummow and Bell JJ found that the legislation "conscripted" the State court (at [97]). Similarly, in Totani, Hayne J said (at [82]) that the legislation "enlist[ed] the Magistrates Court to implement decisions of the executive" and Crennan and Bell JJ described the legislation as "rendering the court an instrument of the Executive" (at [436]). In Wainohu, French CJ and Kiefel J stated that the legislation "provide[d] for the enlistment of judges of the Supreme Court to determine applications for declarations using processes which, if adopted by the Court itself, would be repugnant to the judicial function" (at [6]). In Kable, the legislation was described as having "sap[ped]" the court of its institutional integrity, "cloak[ing]" the work of the executive in the "neutral colours of judicial action" (at 133, per Gummow J).

11. As the plaintiffs acknowledge, there is no decision applying Kable in the manner for which they contend, namely an allegation that the State law has usurped or undermined the State court by excluding it from performing a function that is said to be central to the role of a court: Plaintiff's written submissions ("PWS") at [54].

12. The remarks of French CJ in IFTC at [56] that institutional integrity may be impaired by "depriving" a court of "an important characteristic of judicial power" must be read in context (cf PWS at [55]). Specifically, his Honour was there speaking of the statutory conferral of a duty to hear the application for the sequestration of property and at the same time the removal, in respect of such applications, of one of the incidents of judicial power (namely, the duty to hear the application for the sequestration of property). That his Honour's comments were so limited is apparent from the finding that immediately follows, namely that by "directing the Court as to the manner of the exercise of its jurisdiction, [the legislation] distorts the institutional integrity of the court and affects its capacity as the repository of federal jurisdiction".

13. There is no basis in policy or in principle to extend Kable in the manner asserted by the plaintiffs. The principle in Kable derives from the establishment of an integrated court system by ss. 71, 73(ii) and 77(iii) the Constitution, and the constitutional contemplation of the exercise of federal jurisdiction by State and Territory courts: Emmerson at [40], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ. Accordingly, it is fundamental to the operation of the principle that there be a conferral of a power or function on a court that is invested with federal jurisdiction.

For this reason, the question of whether a law is invalid by reason of Kable "depends on the effect of the law upon the functioning of the courts": Kuczborski at [231], per Crennan, Kiefel, Gageler and Keane JJ.

14. It is in this respect that the Kable principle differs markedly from the doctrine of separation of powers. That is, the doctrines differ in the fundamental respect that Kable is only concerned with the investiture of functions on a court, whereas the separation of powers doctrine is concerned with the exercise of judicial power by the legislature and the executive or vice versa.

15. Decisions of this Court have emphasised that the Kable principle does not import the separation of powers doctrine to State and Territory legislatures: Pollentine at [42], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38 at [124], per Hayne, Crennan and Bell JJ; Fardon v Attorney General (Qld) (2004) 223 CLR 575 at [101]. Indeed, the absence of a doctrine of separation of powers in the States was emphasised in Kable itself: Kable at 92–94, per Toohey J, at 103–104, per Gaudron J, at 118, per McHugh J.

16. Because the separation of powers doctrine does not apply in terms to the States and Territories, there "can be no direct application of all aspects of the doctrines that have been developed in relation to Ch. III": Pompano at [125], per Hayne, Crennan and Bell JJ; see similarly Pollentine at [42], per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ. In particular, there can be no direct application of what has been said in the Ch. III context about the "usurpation" of judicial power: Kuczborski at [104], per Hayne J. Rather, as outlined above, the Kable principle directs attention to the function which is conferred on the State court, and the manner in which the Court is required to perform that function.

The Police Administration Act (NT)

17. Because Div. 4AA of the PAA does not confer a function on a Territory court, it follows that the PAA does not jeopardise the independence or institutional integrity of any Northern Territory court that is invested with federal jurisdiction. In these circumstances, Div. 4AA of the PAA does not contravene Kable.

18. In any event, on the construction of Div. 4AA propounded by the defendant (an interpretation which is accepted by the Attorney General for New South Wales), there is no removal of any function from the court.

19. The validity of Div. 4AA of the PAA must be considered in the context of the PAA as a whole. The starting point for such a consideration is s. 123 of the PAA, which authorises a member of the Police Force ("police officer") to arrest a person that the police officer reasonably suspects of having committed, committing or being about to commit an offence. This provision is not limited to particular kinds of offences (cf s. 137(3) of the PAA) and extends to indictable offences, summary offences and "infringement notice offences".

20. Where the person suspected of having committed an infringement notice offence is not intoxicated, the police officer may take the person into custody and hold the person for "up to 4 hours": s. 133AB of the PAA. Importantly, the provision in s. 133AB for the person to be held for "up to 4 hours" is subject to the requirement in s. 137(1) of the PAA that the police officer bring the person before a justice or a court of competent jurisdiction "as soon as is practicable after being taken into custody".

21. Where the person has not been brought before a justice or a court of competent jurisdiction on the expiry of the four hour period, the police officer may deal with the person by unconditional release; releasing the person and issuing an infringement notice; releasing the person on bail; or bringing the person before a justice or court for the infringement notice offence or any other offence allegedly committed by the person: s. 133(3)AB of the PAA.

22. Where the person suspected of having committed an infringement notice offence is intoxicated (as to which, see s. 127A of the PAA), the person may be held until the police officer "believes on reasonable grounds that the person is no longer intoxicated": s. 133AB(2)(a) of the PAA (which is in similar terms to s. 138A of the PAA).

23. When the police officer believes on reasonable grounds that the person is no longer intoxicated, the police officer may deal with the person by unconditional release; by releasing the person and issuing an infringement notice; by releasing the person on bail; or by bringing the person before a justice or court for the infringement notice

offence or any other offence allegedly committed by the person: s. 133(3)AB of the PAA.

24. In summary, as the defendant submits, the requirement under s. 137 to bring a person before a justice or court of competent authority "confines and will invariably include" the period of up to four hours prescribed by s. 133AB for a person who is not intoxicated: Defendant's Written Submissions ("DWS") at [30]. Accordingly, construed in context, it is clear that the powers conferred on police officers are not punitive in nature and that no function has been removed from the court by the enactment of Div. 4AA.

25. It is only where an offender is intoxicated that the PAA authorises detention for more than four hours (which was the position of the second plaintiff). The detention of intoxicated persons has a long history (Fardon at [13], per Gleeson CJ) and is found in the legislation of most Australian jurisdictions: see, for example, s. 4 of the Intoxicated People (Care and Protection) Act 1994 (ACT), s. 206 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), Intoxicated Persons Act 1979 (NSW) (now repealed), s. 390E of the Police Powers and Responsibilities Act 2000 (Qld), s. 7 of the Public Intoxication Act 1984 (SA), Part 3 of the Protective Custody Act 2000 (WA) and s.4A of the Police Offences Act 1935 (Tas). Indeed both before and after the insertion of Div. 4AA, s. 138A of the PAA authorised the detention of an intoxicated person for as long as it reasonably appeared to the police officer that the person remained intoxicated.

26. The detention of intoxicated persons is clearly preventative in nature – it is aimed at the protection both of the community and of the individual concerned. Indeed, "[i]t may readily be granted that the frequency with which intoxicated persons act violently poses a distinct threat to our social order and, indeed, at times, to personal safety": R v O'Connor (1980) 146 CLR 64 at 86, per Barwick CJ.

27. The construction of Div. 4AA advanced by the defendant is the preferable construction. It is the consistent with the text and structure of the provisions, with the presumption in favour of construing statutes in accordance with fundamental common law rights and with the principle of legality: Momcilovic v The Queen (2011) 245 CLR 1 at [43], per French CJ, at [441], per Heydon J.

28. In any event, even if, contrary to the above, Div. 4AA of the PAA were to be construed as having the effect of authorising a "superadded" period of detention (either for intoxicated or non-intoxicated persons) (PWS at [45] and [46]), the validity of the PAA would be unaffected. On either interpretation, the purposes of Div. 4AA are those set out by the defendant at DWS [39], namely to ensure that the person is available to be dealt with for an offence if considered appropriate; to preserve public order; to prevent the completion, continuation or repetition of the offence or the commission of another offence; to prevent the concealment, loss or destruction of evidence; to prevent the harassment of persons in the vicinity; and to preserve the safety or welfare of the public or the person detained. The length of the detention is strictly limited – to only four hours in the case of a non-intoxicated person, and only until the intoxication ceases for an intoxicated person: cf Al Kateb v Godwin (2004) 219 CLR 562. Accordingly, even on the plaintiff's construction of Div. 4AA, the purpose of the Division is not punitive in nature. It is accepted even in a Ch. III context that involuntary detention can result from executive or legislative action, provided that the detention cannot be characterised as punitive in nature: Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 27-28, per Brennan, Deane and Dawson JJ.

29. Most importantly, on any interpretation, Div. 4AA does not impose any function on a court. Moreover, on any interpretation, the PAA does not interfere with the susceptibility of the decision of the police officer to be challenged in a court, either by way of an application for habeas corpus, an application for judicial review or an action for false imprisonment: cf Kirk v Industrial Relations Commission (2010) 239 CLR 531. In these circumstances, there is no contravention of the Kable principle.

Conclusion

30. The plaintiff's challenge to Div. 4AA of the PAA on Kable grounds should be dismissed.

Part VI: Time Estimate

31. NSW estimates that 15 minutes will be required to present the arguments.

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