



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

BETWEEN: **NORTH AUSTRALIAN ABORIGINAL JUSTICE
AGENCY LIMITED**
Plaintiff
and
NORTHERN TERRITORY OF AUSTRALIA
Defendant

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**SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

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PART I — CERTIFICATION

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

PARTS II & III — INTERVENTION

2. The Attorney-General of the **Commonwealth** intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of neither party. The Commonwealth has given notice under s 78B of the *Judiciary Act* about the issue raised at [40]-[44].

PART IV — ARGUMENT

A INTRODUCTION AND SUMMARY

3. The Plaintiff contends that s 7A(2AB) of the *Bail Act 1982* (NT) substantially impairs the institutional integrity of Territory courts by conferring on them a power to detain in custody which is not “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”: PS [11]. That contention applies a test developed to distinguish judicial from non-judicial power, to a purpose for which it is ill-fitted, given important differences between the principles identified by this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*¹ and *Kable v Director of Public Prosecutions (NSW)*.² Section 7A(2AB) does not confer on a Territory court a function or power that substantially impairs its institutional integrity. Nor is s 7A contrary to the historical development of bail: cf PS [15]-[21]. However, to the extent that s 7A purports to apply of its own force to Commonwealth offences, that provision is beyond Territory legislative power and is invalid.

B STANDING AND THE PRUDENTIAL APPROACH

4. The Commonwealth does not take a position on the Plaintiff’s standing to challenge the validity of s 7A(2AB) of the *Bail Act*.
5. Even if the Plaintiff has standing, it does not necessarily follow that the Court should decide the whole of the Plaintiff’s claim for a declaration that s 7A(2AB) is invalid. The Court decides constitutional issues where “there exists a state of facts which makes it necessary to decide [them] in order to do justice in the given case and to determine the

¹ (1992) 176 CLR 1.

² (1996) 189 CLR 51.

rights of the parties”.³ The Court’s function in answering a question of law stated for its opinion is “not advisory but adjudicative”. Performance of that function “proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy”.⁴ The Plaintiff should not be permitted to “roam at large” over potential applications of s 7A(2AB) that do not arise on the facts as set out in the Special Case, provided that s 7A(2AB), if invalid in those potential applications, would be capable of being severed or read down and is otherwise valid.⁵

C THE PLAINTIFF’S RELIANCE ON *LIM*

6. The Plaintiff contends that s 7A(2AB) of the *Bail Act* infringes the limit on State and Territory legislative power first articulated by this Court in *Kable* (the ***Kable* principle**): PS [45]; SCB 14 [23]. That limit, which applies equally to State and Territory legislative power,⁶ was summarised by the plurality in *Attorney-General (NT) v Emmerson*:⁷

[B]ecause the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction, is constitutionally invalid.

7. Although the *Kable* principle is derived from Ch III of the Constitution, it is “not at all comparable”⁸ with the limits on Commonwealth legislative power that result from the

³ *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (the Court). See also *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [20] (Kiefel CJ and Keane J), [114] (Gordon J), [208] (Edelman J); *Deripaska v Minister for Foreign Affairs* (2026) 100 ALJR 650 at [95] (Gordon and Steward JJ), [133] (Edelman J), [221] (Beech-Jones J).

⁴ *Mineralogy* (2021) 274 CLR 219 at [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Clubb v Edwards* (2019) 267 CLR 171 at [137] (Gageler J).

⁵ *Knight v Victoria* (2017) 261 CLR 306 at [33] (the Court); *Mineralogy* (2021) 274 CLR 219 at [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Farm Transparency* (2022) 277 CLR 537 at [19] (Kiefel CJ and Keane J), [116]-[117] (Gordon J); *Deripaska* (2026) 100 ALJR 650 at [97] (Gordon and Steward JJ), [133] (Edelman J).

⁶ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [28]-[30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (*NAAJA*) at [41] (French CJ, Kiefel and Bell JJ), [119] (Gageler J), [182] (Keane J).

⁷ (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (citations omitted). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [15] (Gleeson CJ); *Kuczborski v Queensland* (2014) 254 CLR 51 at [139] (Crennan, Kiefel, Gageler and Keane JJ); *NAAJA* (2015) 256 CLR 569 at [39(1)] (French CJ, Kiefel and Bell JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [55] (Bell, Keane, Nettle and Edelman JJ); *Garlett v Western Australia* (2022) 277 CLR 1 at [7] (Kiefel CJ, Keane and Steward JJ).

⁸ *Kable* (1996) 189 CLR 51 at 103 (Gaudron J).

structural separation of the judicial power of the Commonwealth effected by Ch III. A Commonwealth law cannot confer authority to exercise any part of the judicial power of the Commonwealth other than on a court. Nor can it confer on a court any authority which is not part of, or incidental to, the judicial power of the Commonwealth. Those limits do not apply to State⁹ or Territory¹⁰ laws; which can confer State or Territory judicial power on bodies that are not State or Territory courts, and can confer non-judicial power on State or Territory courts. The *Kable* principle “does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth”.¹¹ Nor does the Constitution impose the separation of judicial power effected by Ch III on the Territories. A State or Territory law may be valid even though, if it were a law of the Commonwealth, it would infringe Ch III:¹² “[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State”.¹³

8. Rather than the structural separation of judicial power, the “essential notion” at the heart of the *Kable* principle is that of repugnancy to, or incompatibility with, the institutional integrity of State or Territory courts.¹⁴ Determining whether a power or function conferred on a State or Territory court is incompatible with the court’s institutional integrity directs attention to the “defining characteristics” of such courts.¹⁵ Those characteristics include the appearance and reality of independence and

⁹ *Kable* (1996) 189 CLR 51 at 66-67 (Brennan CJ), 78 (Dawson J), 103-104 (Gaudron J), 109 (McHugh J), 137, 142 (Gummow J); *Fardon* (2004) 223 CLR 575 at [36]-[37] (McHugh J), [86] (Gummow J), [198] (Hayne J), [219] (Callinan and Heydon JJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1 at [201] (Hayne J); *Wainohu v New South Wales* (2011) 243 CLR 181 at [45] (French CJ and Kiefel J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [137] (Gordon J).

¹⁰ See *NAAJA* (2015) 256 CLR 569 at [104]-[118] (Gageler J), [157]-[171] (Keane J).

¹¹ *Fardon* (2004) 223 CLR 575 at [86] (Gummow J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [22] (French CJ), [124]-[126] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Garlett* (2022) 277 CLR 1 at [274] (Edelman J).

¹² *Fardon* (2004) 223 CLR 575 at [87] (Gummow J), [219] (Callinan and Heydon JJ); *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ).

¹³ *Fardon* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ); see also at [36] (McHugh J).

¹⁴ *Fardon* (2004) 223 CLR 575 at [101] (Gummow J); see also at [15], [23] (Gleeson CJ), [37] (McHugh J), [198] (Hayne J), [219] (Callinan and Heydon JJ). See further *Totani* (2010) 242 CLR 1 at [205] (Hayne J); *Pompano* (2013) 252 CLR 38 at [123] (Hayne, Crennan, Kiefel and Bell JJ); *Kuczborski* (2014) 254 CLR 51 at [38] (French CJ), [102] (Hayne J); *Garlett* (2022) 277 CLR 1 at [182] (Gordon J).

¹⁵ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [89] (French CJ); *Totani* (2010) 242 CLR 1 at [62] (French CJ), [443] (Kiefel J); *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ); *Wainohu* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *NAAJA* (2015) 256 CLR 569 at [39(2)] (French CJ, Kiefel and Bell JJ), [121] (Gageler J).

impartiality,¹⁶ the application of procedural fairness,¹⁷ and the provision of reasons for the court's decisions.¹⁸

9. Justices of this Court have repeatedly acknowledged that application of the *Kable* principle “requires close attention to the detail of impugned legislation”,¹⁹ and that “no single comprehensive statement” can be given of the “essential notion of repugnancy to, or incompatibility with, the institutional integrity of State [or Territory] courts”.²⁰ It is a multifaceted concept, which does not readily support bright line distinctions.
10. Here, the Plaintiff contends that, where a State or Territory law authorises a State or Territory court to detain a person in custody, other than in the performance of the function of adjudging and punishing criminal guilt, whether that law substantially impairs the institutional integrity of the court can be determined by the application of a single test imported from this Court's decisions concerning the structural separation of powers effected by Ch III. It says that such a law will substantially impair the court's institutional integrity, unless it is “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”: PS [11].²¹

¹⁶ *Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45 at [41] (Gleeson CJ), [64], [66] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [10] (Gummow, Hayne, Heydon and Kiefel JJ); *Totani* (2010) 242 CLR 1 at [72] (French CJ), [427]-[428] (Crennan and Bell JJ), [443] (Kiefel J); *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ); *Emmerson* (2014) 253 CLR 393 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Garlett* (2022) 277 CLR 1 at [244] (Edelman J).

¹⁷ *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319 at [4], [54]-[55] (French CJ); *Pompano* (2013) 252 CLR 38 at [194] (Gageler J); *NAAJA* (2015) 256 CLR 569 at [39(3)] (French CJ, Kiefel and Bell JJ); *Garlett* (2022) 277 CLR 1 at [244] (Edelman J).

¹⁸ *Wainohu* (2011) 243 CLR 181 at [7], [44], [54]-[56] (French CJ and Kiefel J), [104] (Gummow, Hayne, Crennan and Bell JJ); *NAAJA* (2015) 256 CLR 569 at [39(3)] (French CJ, Kiefel and Bell JJ); *Garlett* (2022) 277 CLR 1 at [244] (Edelman J).

¹⁹ *Fardon* (2004) 223 CLR 575 at [104] (Gummow J). See also *Totani* (2010) 242 CLR 1 at [69(4)] (French CJ); *Pompano* (2013) 252 CLR 38 at [137], [155] (Hayne, Crennan, Kiefel and Bell JJ).

²⁰ *Garlett* (2022) 277 CLR 1 at [182] (Gordon J). See also *Fardon* (2004) 223 CLR 575 at [104] (Gummow J); *Totani* (2010) 242 CLR 1 at [69(4)] (French CJ), [207] (Hayne J); *K-Generation* (2009) 237 CLR 501 at [90] (French CJ); *Wainohu* (2011) 243 CLR 181 at [30] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38 at [124] (Hayne, Crennan, Kiefel and Bell JJ); *Kuczborski* (2014) 254 CLR 51 at [38] (French CJ), [103], [106] (Hayne J); *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ).

²¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [39] (the Court). See also *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 (*Benbrika [No 2]*) at [35]-[36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [73] (Gordon J); *Jones v Commonwealth* (2023) 280 CLR 62 at [41] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [154] (Edelman J); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [8], [18], [64] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19 v Commonwealth* (2026) 100 ALJR 400 at [12] (Gageler CJ and Gleeson J), [76] (Gordon J), [296] (Jagot J), [348] (Beech-Jones J).

11. That contention should be rejected. It elides the distinction, carefully worked through in decisions of this Court, between the *Kable* principle and the limits on Commonwealth legislative power derived from the separation of powers.
12. In *Lim*, this Court considered an argument that a Commonwealth law which authorised the Executive to detain persons in custody was invalid on the basis that it purported to confer the judicial power of the Commonwealth other than on a court, contrary to the separation of powers effected by Ch III. In addressing that argument — and determining whether the power to detain at issue in that case was “essentially and exclusively judicial in character”²² — Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) reasoned from two premises. The first premise was that the function of adjudging and punishing criminal guilt is exclusively part of judicial power. The second premise was that, in conferring that function exclusively on courts, the Constitution is concerned with substance rather than form. From those premises, their Honours reasoned that a Commonwealth law could not confer on the Executive an arbitrary power to detain persons in custody, even if that power were conferred in terms divorced from punishment and guilt (given the focus on substance over form).²³ But their Honours also accepted that a Commonwealth law could validly confer on the Executive a power to detain an alien in custody for the purposes of expulsion or deportation.²⁴ In that context, their Honours said that the relevant provisions of the Commonwealth law at issue in *Lim* “will be valid laws if the detention which they require and authorize is limited to what is 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”.²⁵ If that requirement were not met, their Honours said the provisions “will be of a punitive nature and contravene Ch III’s insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates”.²⁶
13. The question whether a Commonwealth law that confers a power to detain a person in custody (or to impose another form of detriment that is *prima facie* punitive) is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, has been

²² *Lim* (1992) 176 CLR 1 at 27.

²³ *Lim* (1992) 176 CLR 1 at 27.

²⁴ *Lim* (1992) 176 CLR 1 at 32.

²⁵ *Lim* (1992) 176 CLR 1 at 33.

²⁶ *Lim* (1992) 176 CLR 1 at 33.

asked in more recent judgments of this Court for the purpose of determining whether such a power, conferred on the Executive, is properly characterised as punitive and therefore exclusively judicial.²⁷ It is a question asked for the purpose of determining whether the relevant power is judicial in character by reference to the separation of powers effected by Ch III. It is not apt to furnish an answer to the distinct question, on which the *Kable* principle focuses, of whether a power or function conferred on a State or Territory court is repugnant to, or incompatible with, the institutional integrity of that court.

14. Even accepting that it is necessary to ask whether a Commonwealth law that confers on a court the power to detain a person in custody other than in the performance of adjudging and punishing criminal guilt is reasonably necessary for a legitimate and non-punitive purpose,²⁸ that question is ill-suited to State or Territory laws. Whether a purpose is “legitimate”, in the sense of being compatible with the constitutionally prescribed system of government,²⁹ involves consideration of compatibility with a system of government that includes the separation of powers.³⁰ Absent a separation of powers in the States and Territories, what is “exceptional”³¹ takes its character from matters including that it may be possible for a State or Territory law to itself impose punishment,³² or to confer a power that is punitive in character other than on a court.³³ A State or Territory law which disproportionately pursues a non-punitive end will not necessarily be repugnant to, or incompatible with, the institutional integrity of a State or Territory court.³⁴ Further, the Court’s recognition that only “extreme legislation” will be incompatible with,

²⁷ *Benbrika [No 2]* (2023) 280 CLR 1 at [73] (Gordon J), [94] (Edelman J); *Jones* (2023) 280 CLR 62 at [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ* (2023) 280 CLR 137 at [39] (the Court); *YBFZ* (2024) 99 ALJR 1 at [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19* (2026) 100 ALJR 400 at [12]-[14] (Gageler CJ and Gleeson J), [76], [82] (Gordon J), [161]-[162] (Edelman J), [296] (Jagot J), [348] (Beech-Jones J). See also *Kruger* (1997) 190 CLR 1 at 162 (Gummow J).

²⁸ *NZYQ* (2023) 280 CLR 137 at [28], [39] (the Court); *YBFZ* (2024) 99 ALJR 1 at [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19* (2026) 100 ALJR 400 at [14] (Gageler CJ and Gleeson J).

²⁹ *NZYQ* (2023) 280 CLR 137 at [40] (the Court).

³⁰ See *NZYQ* (2023) 280 CLR 137 at [40] (the Court), citing *Lim* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ). That passage from the reasoning in *Lim* concerned the separation of the judicial power of the Commonwealth effected by Ch III. See also *Jones* (2023) 280 CLR 62 at [78] (Gordon J); *EGH19* (2026) 100 ALJR 400 at [313] (Jagot J).

³¹ *NZYQ* (2023) 280 CLR 137 at [40] (the Court).

³² See *Benbrika [No 2]* (2023) 280 CLR 1 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), referring to *Emmerson* (2014) 253 CLR 393 at [24]-[27], [60], [69] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

³³ See *Fardon* (2004) 223 CLR 575 at [40] (McHugh J); cf *Totani* (2010) 242 CLR 1 at [76] (French CJ), [147] (Gummow J).

³⁴ See *EGH19* (2026) 100 ALJR 400 at [175] (Edelman J).

or repugnant to, the institutional integrity of a State or Territory court³⁵ underscores that, insofar as calibration between means and ends is relevant to the *Kable* principle, the degree of calibration required is different to that required for Commonwealth laws.

15. This Court’s previous decisions applying the *Kable* principle to laws conferring, on a State court, the power to detain a person in custody, other than as an incident of the adjudgment and punishment of criminal guilt, reveal that the application of that principle involves a broad consideration of the features of the relevant law.³⁶ While members of the Court have referred, in those cases, to aspects of the reasoning in *Lim*, that has not usually involved asking whether the power to detain conferred by the law was reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.

- 10 16. In *Kable*, Toohey J’s reasoning was premised on the view that the Supreme Court was exercising the judicial power of the Commonwealth.³⁷ His Honour stressed the *ad hominem* nature of the *Community Protection Act 1994* (NSW), which informed its “extraordinary” and “unique” character;³⁸ observing that “here the judicial power of the Commonwealth is involved, in circumstances where the Act is expressed to operate in relation to one person only, the appellant, and has led to his detention without a determination of his guilt for any offence”.³⁹ Gaudron J carefully distinguished between the *Kable* principle and the limitation on the legislative power of the Commonwealth articulated in *Boilermakers*.⁴⁰ Her Honour’s conclusion that the Act was invalid reflected considerations including that the Supreme Court was required to deprive the appellant of his liberty on the basis of an opinion formed, on the balance of probabilities, by reference to material that may or may not be admissible in legal proceedings.⁴¹
- 20 Similarly, McHugh J expressly stated that “[i]t is not merely that the Act involves the

³⁵ *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ).

³⁶ Specifically, *Kable*, *Fardon* and *Garlett*, discussed in paragraphs 16 to 18 below. A similar observation can be made about the reasoning of the plurality in *Vella*, with which Kiefel CJ agreed: *Vella* (2019) 269 CLR 219 at [20] (Kiefel CJ), [21]-[24], [55]-[56] (Bell, Keane, Nettle and Edelman JJ).

³⁷ (1996) 189 CLR 51 at 95, 96 (“it is the exercise of federal jurisdiction by the Supreme Court in the circumstances arising under the Act that is challenged”).

³⁸ (1996) 189 CLR 51 at 98.

³⁹ (1996) 189 CLR 51 at 99.

⁴⁰ (1996) 189 CLR 51 at 103, referring to *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

⁴¹ (1996) 189 CLR 51 at 106-107. Section 17(3) provided that “[d]espite any Act or law to the contrary, the Court must receive in evidence any document or report of a kind referred to in subsection (1) ... that is tendered to it in proceedings under this Act”: at 105.

Supreme Court in the exercise of non-judicial functions or that it provides for punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done”.⁴² Rather, the vice lay in the object of the Act to ensure the imprisonment of the appellant after the expiry of his sentence,⁴³ which was to be achieved “by removing the need to prove guilt beyond reasonable doubt, by providing for proof by materials that may not satisfy the rules of evidence and by declaring the proceedings to be civil proceedings although the Court is not asked to determine the existing rights and liabilities of any party or parties”.⁴⁴ Gummow J considered the Act to be “repugnant to the judicial process in a fundamental degree” because it rendered the Supreme Court of a State “an essential and determinative integer of a scheme whereby, by its order, an individual is incarcerated in a penal institution otherwise than for breach of the criminal law”.⁴⁵ However, in *Fardon*, Gummow J explained his earlier decision in *Kable* on the basis that “it was a particular combination of features of the [New South Wales] Act that led to its invalidity”, including “the apparent legislative plan to conscript the Supreme Court of New South Wales to procure the imprisonment of the appellant by a process which departed in serious respects from the usual judicial process”.⁴⁶

17. In *Fardon*, several members of the Court expressly observed that whether a Commonwealth law equivalent to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (**DPSO Act**) would have been valid, did not determine whether the DPSO Act infringed Ch III.⁴⁷ Rather, the majority justices focused on whether the DPSO Act impaired the institutional integrity of the Supreme Court of Queensland in respect of its independence and impartiality.⁴⁸ In particular, in applying the *Kable* principle to the DPSO Act, Gummow J (with whom Hayne J relevantly agreed) appears to have proceeded on the basis that the “nature of the process for which the Act provides” was more important than “the nature of the outcome [that is, detention in custody]”.⁴⁹

⁴² (1996) 189 CLR 51 at 121-122.

⁴³ (1996) 189 CLR 51 at 121.

⁴⁴ (1996) 189 CLR 51 at 122.

⁴⁵ (1996) 189 CLR 51 at 132-133.

⁴⁶ (2004) 223 CLR 575 at [100] (Gummow J).

⁴⁷ *Fardon* (2004) 223 CLR 575 at [18] (Gleeson CJ), [86]-[89] (Gummow J), [219] (Callinan and Heydon JJ); [36] (McHugh J).

⁴⁸ *Garlett* (2022) 277 CLR 1 at [296]-[305] (Gleeson J).

⁴⁹ Compare *Fardon* (2004) 223 CLR 575 at [85] and [90] (Gummow J); see also at [196] (Hayne J).

18. In *Garlett*, the appellant challenged the validity of ss 7 and 48 of the *High Risk Serious Offenders Act 2020* (WA) (**HRSO Act**) on the basis that the powers conferred were non-judicial. The plurality said that this “conflated the *Kable* issue” with a contention that the power exercisable under the impugned legislation “was not judicial power such as might be conferred upon a court exercising federal jurisdiction consistently with Ch III”.⁵⁰ Their Honours observed that “[w]hether or not [the power to make a continuing detention order] is judicial or non-judicial in character is not determinative as to whether the *Kable* principle has been infringed”, and that the *Lim* principle had “no application” to establish the invalidity of the HRSO Act.⁵¹ Similarly, Gleeson J observed that “the *Lim* principle was articulated as a constitutive part of the doctrine of the separation of Commonwealth judicial power, not as a doctrine about the nature of Ch III courts or the characteristics of Ch III courts that are essential to the institutional integrity of those courts”;⁵² such that it would be a “significant step” to conclude that the *Lim* principle operates as an additional constraint on State and Territory legislative power, over and above the *Kable* principle.⁵³
19. The Commonwealth does not contend that it is irrelevant to the application of the *Kable* principle that a State or Territory law authorises a State or Territory court to detain a person in custody other than in the performance of the function of adjudging and punishing criminal guilt, or that the law authorises the court to do so for purposes traditionally associated with punishment. However, in applying the *Kable* principle, those matters are not properly brought into account by asking whether the power to detain conferred by the impugned law is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. They are instead aspects of the overall consideration of the operation, effect and historical context of the law that is undertaken to determine whether the law substantially impairs the institutional integrity of the State or Territory court.⁵⁴

⁵⁰ (2022) 277 CLR 1 at [39] (Kiefel CJ, Keane and Steward JJ).

⁵¹ (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ).

⁵² (2022) 277 CLR 1 at [294] (citations omitted).

⁵³ (2022) 277 CLR 1 at [293].

⁵⁴ This coheres with the attention given by some members of the majority in *Fardon* and *Garlett* to the preventive objects of the DPSO Act and the HRSO Act, respectively: *Fardon* (2004) 223 CLR 575 at [19]-[20] (Gleeson CJ), [34] (McHugh J), [216]-[217], [219] (Callinan and Heydon JJ); *Garlett* (2022) 277 CLR 1 at [55]-[56] (Kiefel CJ, Keane and Steward JJ).

20. For those reasons, the Court should reject the Plaintiff’s invitation to consider the validity of s 7A(2AB) of the *Bail Act* by asking whether it is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. The validity of s 7A(2AB) is to be resolved by focusing on whether the provision purports to confer on a Territory court a function or power which is repugnant to, or incompatible with, its institutional integrity. That focus begins with considering the operation of s 7A(2AB).

D THE *KABLE* PRINCIPLE AND SECTION 7A(2AB)

D.1 The operation of s 7A(2AB)

21. The *Bail Act* codifies the granting of bail in the Northern Territory, abolishing powers or duties existing at common law to grant bail to an accused in connection with criminal proceedings: s 49. Except for offences to which s 7A applies, there is a presumption in favour of bail: s 8. Section 7A states that it applies to persons accused of the offences listed in s 7A(1). Insofar as it applies to courts, s 7A provides for a two-step process:⁵⁵

21.1 the court is to consider whether the accused has satisfied the court that bail should be granted, having regard to the matters in s 24 (and s 24A if the accused is a youth), and in particular the paramount consideration, in s 24(1)(aa), of the risk to the safety of the community that would result from the accused’s release on bail: s 7A(2), (2AA); and

21.2 if the first step is met, the court must refuse bail unless the court “has a high degree of confidence, when considered in isolation from the matters mentioned in sections 24 and 24A” that the accused will not, if released on bail, commit a “prescribed offence” (see s 3B) or a “serious violence offence” (see s 3(1)), or otherwise endanger the safety of the community: s 7A(2AB).

22. In determining whether it has a “high degree of confidence” that the things stipulated in s 7A(2AB) “will not” occur, the court must engage in a probabilistic assessment of the likelihood of those things occurring.⁵⁶ The rules of evidence apply to the material upon which the court is to make its determination under s 7A(2AB).⁵⁷ A “high degree of

⁵⁵ *R v EM* [2025] NTSC 31 at [12]-[15] (Reeves J); *R v Abuelheish* (2025) 396 FLR 73 at [24] (Reeves J).

⁵⁶ *RB v The King (No 2)* [2024] NSWSC 845 at [69(7), (9)] (Walton J), applied in *Abuelheish* (2025) 396 FLR 73 at [27]-[29] (Reeves J).

⁵⁷ *Evidence (National Uniform Legislation) Act 2011* (NT) ss 4(1)(a), 8. The rules of evidence do not apply to the matters under s 24: *Bail Act* s 24(2).

confidence” is not a state of certainty:⁵⁸ cf PS [41]. It is a state of belief, formed probabilistically, which tolerates some doubt; as opposed to a state of knowledge, admitting of no doubt. “In isolation from” indicates that the court is not to re-engage in the analysis undertaken under s 7A(2). Yet, nor is the court precluded from considering the matters referred to in ss 24 and 24A, where they are relevant to assessing the likelihood of the accused committing a prescribed offence or a serious violence offence, or otherwise endangering the safety of the community: cf PS [31], [36], [40].

23. In determining whether it has a “high degree of confidence” that the accused will not, if released on bail, commit a prescribed offence or a serious violence offence, or otherwise endanger the safety of the community, the court is to have regard to the conditions it would be required to impose, in granting bail, “to minimise risks to the safety or welfare of others, or to the proper administration of justice, that may result from releasing the accused person on bail”: s 28(1). Those conditions may contribute to the “high degree of confidence” required under s 7A(2AB).⁵⁹
24. In speaking of whether an accused will not “endanger the safety of the community”, s 7A(2AB)(b) can be contrasted with the paramount consideration of “the risk (if any) to the safety of the community” under the first step in s 7A(2): s 24(1)(aa). Section 7A(2AB)(b) does not refer to any form of risk to the safety of the community: cf PS [33]. To “endanger”, or to expose to danger,⁶⁰ implies (at least) a prospect of injury and directs attention to the related considerations of the probability of injury and the consequence should the prospect of injury materialise⁶¹: cf PS [37].

D.2 The history of bail

25. The focus of s 7A of the *Bail Act* upon the risk of an accused committing offences on bail, and upon the risk to safety of the community, is not contrary to the historical development of bail: cf PS [15]-[21].
26. The practice of bail emerged in a historical context in which the arrest of an accused person entailed imprisonment until the matter was heard, which in some cases took

⁵⁸ *RB* [2024] NSWSC 845 at [69(10)] (Walton J), applied in *Abuelheish* (2025) 396 FLR 73 at [28]-[29] (Reeves J).

⁵⁹ *RB* [2024] NSWSC 845 at [69(7)] (Walton J).

⁶⁰ *Macquarie Dictionary* (online), definition of “endanger”.

⁶¹ *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 550 at [106]-[120] (Thomas and Snaden JJ).

years.⁶² Abuses of the discretion to grant an accused bail led, in 1275, to regulation of that discretion by the *Statute of Westminster I*,⁶³ which provided for categories of persons who were, and were not, to be bailed.⁶⁴ The categories of persons not to be bailed included those who had committed serious offences (such as homicide, arson and treason) or offences in which the guilt of the accused was certain (such as thieves “openly defamed and known” and persons who had confessed), and offenders who were “outlaws” of justice (such as prison escapees).⁶⁵ It has been observed that the likely justification for at least some of these categories was the prevention of future crimes and flight.⁶⁶

27. The *Statute of Westminster I* supplied the foundation of the law of bail until the 19th century.⁶⁷ However, statutes passed in the 17th and 18th centuries “attempted to deal with increasing crime by denying bail to additional capital crimes and offenses. By the time Michael Dalton’s popular manual for justices of the peace was published in 1622, over 150 crimes were nonbailable.”⁶⁸ This history tends to suggest, as Gleeson CJ observed in *Chau v Director of Public Prosecutions*, that there was no common law right to bail for an accused charged with a serious offence (or that, if there was such a right, it could be modified by statute).⁶⁹
28. The *Statute of Westminster I* did not attempt to prescribe a unitary principle upon which all decisions about bail were to be based. It was not until 1835 that English statutes governing bail procedure authorised bailing for any offence and supplied a single criterion of whether the grant of bail would endanger the appearance of the accused at trial.⁷⁰ That criterion was stipulated in the *Indictable Offences Act 1848*,⁷¹ and by Coleridge J in

⁶² Donovan, *The Law of Bail: Practice, Procedure and Principles* (1981) at 23; Stephen, *A History of the Criminal Law of England: Volume I* (1883) at 233.

⁶³ 3 Edw 1, chs 12 and 15.

⁶⁴ Donovan, *The Law of Bail: Practice, Procedure and Principles* (1981) at 24; Bottomley, “The Granting of Bail: Principles and Practice” (1968) 31 *Modern Law Review* 40 at 44-45.

⁶⁵ Bottomley, “The Granting of Bail: Principles and Practice” (1968) 31 *Modern Law Review* 40 at 45.

⁶⁶ Metzmeier, “Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations” (1996) 8 *Pace International Law Review* 399 at 402.

⁶⁷ Holdsworth, *A History of English Law: Volume IV* (1923) at 528; Stephen, *A History of the Criminal Law of England: Volume I* (1883) at 234; Bottomley, “The Granting of Bail: Principles and Practice” (1968) 31 *Modern Law Review* 40 at 45.

⁶⁸ Metzmeier, “Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations” (1996) 8 *Pace International Law Review* 399 at 403.

⁶⁹ (1995) 37 NSWLR 639 at 646.

⁷⁰ Bottomley, “The Granting of Bail: Principles and Practice” (1968) 31 *Modern Law Review* 40 at 46-47.

⁷¹ 11 & 12 Vict, c 47, s 23.

In re Robinson, by reference to three factors: the nature and seriousness of the crime, the probability of conviction, and the severity of the likely punishment.⁷² Early Australian bail decisions applied that test for bail: see PS [17]. But the view was also expressed that “the interests of the community must equally be protected by proper detention and punishment of criminals, and this will not ... be best served by freeing such persons on bail in serious cases, except in the presence of exceptional circumstances”.⁷³

29. In the 1947 case of *R v Phillips*, involving an accused charged with housebreaking, the English Court of Criminal Appeal recognised that bail could be denied where there was a high probability that the accused would commit an offence while on bail.⁷⁴ In 1955, the Court of Criminal Appeal held that “it is the duty of the justices to inquire into the antecedents of a man who is applying to them for bail, and, if they find that he has a bad record — particularly a record which suggests that he is likely to commit similar offences while on bail — that is a matter which they must consider before granting bail”.⁷⁵ A 1968 survey of English bail decisions noted that “[b]y far the most common factor cited in the more recent reported cases, as justification for magistrates to refuse bail, is the combined factor of a man’s previous criminal record and the consequent likelihood that he will commit further offences if released on bail”.⁷⁶
30. Following *Phillips*, Australian decisions accepted that “one of the considerations relevant to the granting of bail ... is the possible effect of the granting of bail upon the safety of the public or the security of its property” and that “the probability or reasonable possibility of an accused committing another crime pending trial while on bail may be a relevant matter for consideration and may in a proper case lead to the refusal of bail”.⁷⁷ It thus came to be recognised that “other considerations of public interest ... may indicate that bail should not be granted even if the court thought the degree of risk of the accused failing to answer his bail to be minimal or even non-existent”.⁷⁸ Those matters of public

⁷² (1854) 23 LJ QB 286 at 287.

⁷³ *R v Watson* (1947) 64 WN (NSW) 100 at 102 (Herron J).

⁷⁴ (1948) 32 Cr App R 47 at 48-49 (Goddard LCJ, Atkinson and Cassels JJ).

⁷⁵ *R v Armstrong* [1951] 2 All ER 219 at 219 (Goddard LCJ, Lynskey and Devlin JJ).

⁷⁶ Bottomley, “The Granting of Bail: Principles and Practice” (1968) 31 *Modern Law Review* 40 at 51.

⁷⁷ *R v Light* [1954] VLR 152 at 156 (Sholl J), quoting his Honour’s earlier unreported judgment in *R v Lumsden*. See also *R v Harrison* [1950] VLR 20 at 21 (Herring CJ); *R v Alexander* [1956] VLR 451 at 456 (Sholl J); *R v Fisher* (1964) 14 Tas R 12 at [18] (Crawford J); *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300 at 301-302 (Isaacs J); *R v Young* (1966) 83 WN (Pt 1) (NSW) 391 at 395 (Isaacs J); *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325 at 332-333 (Cross Ch QS).

⁷⁸ *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325 at 331 (Cross Ch QS).

interest included the risks of the accused interfering with the course of justice if granted bail (eg, by threatening prosecution witnesses) or committing offences on bail.⁷⁹

31. The courts’ “ancient common law” jurisdiction to grant bail⁸⁰ should therefore be understood as a jurisdiction which: (a) until the 19th century, was regulated by categories of bailable and non-bailable offences, rather than a single criterion of availability for trial; and (b) developed in a manner which recognised that the interests of the community could be a relevant, and in some cases determinative, consideration.

D.3 Section 7A(2AB) does not infringe the *Kable* principle

32. The *Kable* principle should, in turn, be understood and applied bearing in mind that “all legislation reflects political decisions and government policy as a source of laws, substantive and adjectival; and that it is the essential role of the judiciary to enforce those laws by the exercise of judicial power”.⁸¹ Challenges to legislation on the basis of the *Kable* principle turn on the “relatively narrow point” of whether the function conferred by the impugned legislation on a State or Territory court is repugnant to the institutional integrity of the court; not on wider issues of legislative policy.⁸²

33. The power to detain an accused pending trial, including by remanding an accused in custody after refusing bail, is “essential to the functioning of the criminal justice system”.⁸³ One, but not the only, way⁸⁴ in which that is so, is that the detention of an accused ensures that they can be brought before the courts for trial.⁸⁵ It also ensures the proper functioning of the criminal justice system by preventing accused persons from obstructing the administration of justice by, for instance, interfering with witnesses.⁸⁶ Further, as the Supreme Court of Canada has recognised, the bail system “does not function properly if individuals commit crimes while on bail”.⁸⁷ An objective of the wider system of criminal justice, of which the bail system is a part, is “to stop criminal

⁷⁹ *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325 at 331-332 (Cross Ch QS).

⁸⁰ *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

⁸¹ *Garlett* (2022) 277 CLR 1 at [60] (Kiefel CJ, Keane and Steward JJ), See also *Fardon* (2004) 223 CLR 575 at [21] (Gleeson CJ).

⁸² *Fardon* (2004) 223 CLR 575 at [3] (Gleeson CJ).

⁸³ *EGH19* (2026) 100 ALJR 400 at [318(1)] (Jagot J).

⁸⁴ *EGH19* (2026) 100 ALJR 400 at [318(1)] (Jagot J).

⁸⁵ *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

⁸⁶ *R v Fraser* (1892) 13 LR (NSW) 150 at 155 (Windeyer J); *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325 at 331-332 (Cross Ch QS).

⁸⁷ *R v Morales* [1992] 3 SCR 711 at 738 (Lamer CJ, La Forest, Sopinka, McLachlin and Iacobucci JJ).

behaviour”.⁸⁸ Consistently with this, the refusal of bail to an accused may promote the proper functioning of the criminal justice system by preventing the accused from committing further offences pending trial. Indeed, preventing further criminal offending is a reason why the grant of bail is ordinarily conditioned on the accused being of good behaviour pending trial.

34. Section 7A(2AB) is directed to protecting the community from the risk that an accused person will, pending trial, commit certain offences (prescribed offences and serious violence offences) or endanger the safety of the community. Unlike the impugned legislation in *Kable*, it is not directed to a particular person or persons, but is a general law directed to a class of accused.⁸⁹ Like the HRSO Act considered in *Garlett*, the detention authorised by s 7A(2AB) must be supported by a probabilistic risk assessment (not considerations of retribution or deterrence).⁹⁰ The detention the provision authorises, subject to any further applications for bail,⁹¹ is for the period until the trial of the accused.

35. The scope of community protection that s 7A(2AB) seeks to afford is delimited by the class of persons to whom s 7A applies and the nature of the risk assessed by the court.

35.1 As to the former, s 7A(1) lists the offences to which the provision applies, in a similar (if less categorical) manner to the list of non-bailable offences in the *Statute of Westminster I*, as supplemented over the following centuries.⁹² In that sense, s 7A(1) is consistent with the practice of bail over many centuries. It reflects a legislative judgment as to the categories of accused persons in respect of whom, because of the nature of offences with which they have been charged, a presumption of pre-trial detention ought to apply.

35.2 As to the latter, s 7A(2AB) requires the court to consider the likelihood of the accused committing a prescribed offence or serious violence offence, or otherwise endangering the safety of the community. The definitions of “prescribed offence”

⁸⁸ *Morales* [1992] 3 SCR 711 at 738 (Lamer CJ, La Forest, Sopinka, McLachlin and Iacobucci JJ).

⁸⁹ *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [44] (McHugh J).

⁹⁰ *Garlett* (2022) 277 CLR 1 at [55], [56(a)] (Kiefel CJ, Keane and Steward JJ). See also *Vella* (2019) 269 CLR 219 at [78] (Bell, Keane, Nettle and Edelman JJ), citing *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

⁹¹ There is no limit on the number of bail applications that may be made to a court by an accused: *Bail Act* s 19(1).

⁹² See paragraph 26 above.

and “serious violence offence” reflect a legislative judgement as to the offences that could potentially involve harm to the community sufficient to warrant pre-trial detention of an accused. While they cover a “spectrum of conduct”, it is not for the court to second-guess Parliament’s selection:⁹³ cf PS [33]. The reference to otherwise endangering the safety of the community, properly understood,⁹⁴ imposes a threshold of risk of harm which the court must be satisfied exists for s 7A(2AB) to lead to the refusal of bail.

36. The process by which the court is to make a determination under s 7A(2AB) has “many of the safeguards of a judicial trial”⁹⁵ and exhibits the hallmarks of the judicial process.⁹⁶ There is no derogation from the principles of open justice or the rules of natural justice. Unlike the impugned legislation in *Kable*, the assessment under s 7A(2AB) is to be made upon material that is subject to the rules of evidence.⁹⁷ The probabilistic assessment required by s 7A(2AB) coheres with other standards deployed by the legislature to confer power on courts.⁹⁸ Decisions made by the court under s 7A(2AB) can be reviewed: ss 34 and 35. The processes by which the s 7A(2AB) evaluation is undertaken and given effect “are familiar as exercises of judicial power and ... serve to ensure the fairness and rationality of the making of, and giving effect to, the evaluation”.⁹⁹
37. Section 7A(2AB) does not effect the “substantial recruitment of the judicial function ... to an essentially executive process”.¹⁰⁰ The court’s assessment under s 7A(2AB) is made independently of any instruction, advice, or wish of the legislative or executive branches of government.¹⁰¹ While s 7A(2AB) requires the court to refuse bail unless it has the requisite “high degree of confidence” of the matters in the provision, a law that “confers upon a court a power with a duty to exercise it if the court decides that the conditions attached to the power are met, on that ground alone is not to be classified as a

⁹³ *Benbrika* (2021) 272 CLR 68 at [228], [230] (Edelman J); *Garlett* (2022) 277 CLR 1 at [81]-[83] (Kiefel CJ, Keane and Steward JJ).

⁹⁴ See paragraph 24 above.

⁹⁵ *Fardon* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ).

⁹⁶ *Fardon* (2004) 223 CLR 575 at [92] (Gummow J), [220] (Callinan and Heydon JJ); *Garlett* (2022) 277 CLR 1 at [64] (Kiefel CJ, Keane and Steward JJ).

⁹⁷ See paragraphs 16 and 22 above.

⁹⁸ *Fardon* (2004) 223 CLR 575 at [225] (Callinan and Heydon JJ); *Vella* (2019) 269 CLR 219 at [84] (Bell, Keane, Nettle and Edelman JJ); *Garlett* (2022) 277 CLR 1 at [66] (Kiefel CJ, Keane and Steward JJ).

⁹⁹ *Garlett* (2022) 277 CLR 1 at [56(c)] (Kiefel CJ, Keane and Steward JJ).

¹⁰⁰ *Totani* (2010) 242 CLR 1 at [82] (French CJ).

¹⁰¹ *Fardon* (2004) 223 CLR 575 at [116] (Gummow J).

legislative attempt to direct the outcome of the exercise of jurisdiction”.¹⁰² The conferral of jurisdiction on a court to determine a controversy between parties which, when determined, will engage a stated statutory consequence is “unremarkable”.¹⁰³ Unlike the impugned legislation in *Kable*, there is nothing to suggest that the court is to act as “a mere instrument of government policy. The outcome of each case is to be determined on its merits.”¹⁰⁴

38. Finally, it is informative that s 7A(2AB) is consistent with the history of the development of bail.¹⁰⁵ That history reveals that, for centuries until 1835, the powers of bail exercised by justices were constrained by categories of non-bailable offences, in part for the purpose of preventing further offending.¹⁰⁶ Section 7A(2AB) does not go that far, and it is not necessary for this Court to decide whether the Legislative Assembly could validly remove the availability of bail entirely, either generally or in particular circumstances: cf NTS [16]. Further, the history reveals that, prior to the introduction of statutory regimes for bail in Australian jurisdictions, the common law had developed to accept the relevance to the bail decision of the possible effect of granting bail on the safety of the public.¹⁰⁷

39. Having regard to the processes prescribed in s 7A(2AB), it is not “extreme legislation”¹⁰⁸ of the kind that infringes the *Kable* principle.

E SECTION 7A(2AB) AND COMMONWEALTH OFFENCES

40. Proceedings against an accused charged with a Commonwealth offence involve a matter arising under a law of the Commonwealth and thus attract federal jurisdiction.¹⁰⁹ It is beyond the legislative capacity of a State to confer jurisdiction on State courts to hear and determine those proceedings, or otherwise to regulate the exercise of federal

¹⁰² *Totani* (2010) 242 CLR 1 at [133] (Gummow J). See also *International Finance* (2009) 240 CLR 319 at [77] (Gummow and Bell JJ).

¹⁰³ *Emmerson* (2014) 253 CLR 393 at [60] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Garlett* (2022) 277 CLR 1 at [74]–[75] (Kiefel CJ, Keane and Steward JJ).

¹⁰⁴ *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ).

¹⁰⁵ *Forge* (2006) 238 CLR 45 at [42] (Gleeson CJ). See also *Lim* (1992) 176 CLR 1 at 67 (McHugh J); *Jones* (2023) 280 CLR 62 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *EGH19* (2026) 100 ALJR 400 at [325] (Jagot J).

¹⁰⁶ See paragraphs 26 and 27 above.

¹⁰⁷ See paragraphs 29 and 30 above.

¹⁰⁸ *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ).

¹⁰⁹ *R v McGregor* (2026) 100 ALJR 287 at [12] (Gageler CJ, Gleeson and Beech-Jones JJ).

jurisdiction.¹¹⁰ Likewise, in respect of the legislative capacity of the Territory. There being no Commonwealth law enacted pursuant to s 122 of the Constitution conferring on Territory legislatures power to regulate the exercise of federal jurisdiction, they lack power to do so.

41. Instead, by s 68(2) of the *Judiciary Act*, State and Territory courts are vested with “like jurisdiction” to hear and determine proceedings against accused charged with Commonwealth offences.¹¹¹ The exercise of that jurisdiction is regulated by State and Territory laws picked up and applied by s 68(1) of the *Judiciary Act*.¹¹² That relevantly provides that the laws of a State or Territory respecting “the arrest and custody of persons charged with offences” and “for holding accused persons to bail” shall “apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory” by s 68(2). When engaged, s 68(1) operates by picking up and applying the text of a State or Territory law “without change to its meaning” albeit subject to a permissible degree of “translation”.¹¹³ That is subject to qualifications, including that s 68(1) does not apply the text of a State or Territory law to the extent that, in so applying as a Commonwealth law, it would be inconsistent with the Constitution or another Commonwealth law.¹¹⁴
42. By reason of the limits on State and Territory legislative capacity identified in [40] above, State or Territory legislation cannot directly, and of its own force, regulate the grant or refusal of bail in respect of persons accused of Commonwealth offences. Such legislation

¹¹⁰ *Rizeq v Western Australia* (2017) 262 CLR 1 at [60]-[61], [103] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Masson v Parsons* (2019) 266 CLR 554 at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at [37] (Kiefel CJ, Gageler and Gleeson JJ); *McGregor* (2026) 100 ALJR 287 at [12], [34], [40] (Gageler CJ, Gleeson and Beech-Jones JJ), [119]-[120] (Edelman J).

¹¹¹ *Huynh* (2023) 280 CLR 341 at [43] (Kiefel CJ, Gageler and Gleeson JJ), [144] (Gordon and Steward JJ), [211] (Edelman J), [268] (Jagot J); *McGregor* (2026) 100 ALJR 287 at [12]-[13] (Gageler CJ, Gleeson and Beech-Jones JJ), [119] (Edelman J).

¹¹² *Huynh* (2023) 280 CLR 341 at [48] (Kiefel CJ, Gageler and Gleeson JJ), [210] (Edelman J), [267]-[268] (Jagot J); *Farshchi v The King* (2025) 100 ALJR 6 at [2] (Gageler CJ, Gordon, Gleeson and Beech-Jones JJ), [25] (Edelman and Steward JJ); *McGregor* (2026) 100 ALJR 287 at [16] (Gageler CJ, Gleeson and Beech-Jones JJ).

¹¹³ *Huynh* (2023) 280 CLR 341 at [57] (Kiefel CJ, Gageler and Gleeson JJ), [151]-[152] (Gordon and Steward JJ), [184] (Edelman J); *McGregor* (2026) 100 ALJR 287 at [16], [18] (Gageler CJ, Gleeson and Beech-Jones JJ), [65]-[66] (Gordon and Steward JJ).

¹¹⁴ *Huynh* (2023) 280 CLR 341 at [58] (Kiefel CJ, Gageler and Gleeson JJ), [149] (Gordon and Steward JJ); *McGregor* (2026) 100 ALJR 287 at [16]-[17] (Gageler CJ, Gleeson and Beech-Jones JJ), [65]-[66] (Gordon and Steward JJ).

would be an attempt to regulate the exercise of federal jurisdiction and would be invalid. Nor could such legislation be picked up by s 68(1) of the *Judiciary Act*: an invalid State or Territory law supplies nothing to be picked up by the operation of s 68(1).¹¹⁵

43. Section 7A(1) of the *Bail Act* expressly identifies a number of Commonwealth offences to which s 7A is said to apply: s 7A(1)(d)-(da) and s 7A(1)(f) in its reference to a Commonwealth sexual offence.¹¹⁶ Insofar as s 7A is said to apply to such offences, those operations of s 7A are invalid and incapable of being picked up by s 68(1) of the *Judiciary Act*. Those invalid operations of s 7A are severable from the remainder of the provision, if it is otherwise valid.
44. Those subparagraphs of s 7A(1) which identify offences by general description are capable of being picked up and applied by s 68(1) of the *Judiciary Act*, by analogy, to Commonwealth offences of a sufficiently similar description: eg, s 7A(1)(f) insofar as it relates to serious sexual offences described in s 3A(2), and s 7A(1)(de)-(dea) in referring to “prescribed offences”¹¹⁷ and “serious offences”.¹¹⁸

F THE *LIM* PRINCIPLE

45. Insofar as the constitutional limit identified in *Lim* and explained in subsequent decisions of this Court is relevant on the Plaintiff’s alternative case — that s 7A(2AB) of the *Bail Act* is incapable of being applied by s 68(1) of the *Judiciary Act* to persons charged with Commonwealth offences — the following matters can be noticed.
46. The principle in *Lim*, as recently restated by this Court and relevant to the present context, is that, exceptional cases aside, “a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”.¹¹⁹ In this context, “reasonably capable of being seen to be necessary”

¹¹⁵ *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [61] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). See also *Kable v New South Wales* (2012) 268 FLR 1 at [152] (Basten JA).

¹¹⁶ See the definitions of “serious sexual offence” in s 3A(1) and “Commonwealth sexual offence” in s 3(1).

¹¹⁷ Defined in s 3B to include offences against a law of “the Territory or another jurisdiction” that substantially corresponds to an offence prescribed by the regulations under s 3B(a).

¹¹⁸ Defined in s 3(1) to mean any offence punishable by imprisonment for 5 or more years.

¹¹⁹ *NZYQ* (2023) 280 CLR 137 at [39] (the Court); *YBFZ* (2024) 99 ALJR 1 at [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

means “reasonably appropriate and adapted”, rather than essential or indispensable.¹²⁰ The purpose of a law is what the provision is designed to achieve in fact.¹²¹ A “legitimate” purpose is one compatible with the constitutionally prescribed system of government.¹²²

47. In *Lim*, one “exceptional case” was described as “the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power.”¹²³ Rather, “[a]s a power ancillary to the process of adjudging criminal guilt”, the power to detain an accused person in custody pending trial “lies within the category of powers not independently judicial in nature which can be committed to courts as ‘incidents in the exercise of strictly judicial powers’.”¹²⁴ That power has “an obvious and unmistakeable” legitimate and non-punitive purpose: it is “essential to the functioning of the criminal justice system” and is “necessary to enable vindication of judicial power”.¹²⁵ That overarching purpose encompasses a number of legitimate and non-punitive purposes that may be pursued by the legislature:¹²⁶ cf PS [21].

PART V — ESTIMATE OF TIME

48. It is estimated that up to 45 minutes will be required for the presentation of the Commonwealth’s oral argument.

Dated: 6 August 2026



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¹²⁰ *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), referring to *Jones* (2023) 280 CLR 62 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *EGH19* (2026) 100 ALJR 400 at [83], [138] (Gordon J), [296] (Jagot J).

¹²¹ *NZYQ* (2023) 280 CLR 137 at [40] (the Court); *EGH19* (2026) 100 ALJR 400 at [20] (Gageler CJ and Gleeson J), [121] (Gordon J).

¹²² *NZYQ* (2023) 280 CLR 137 at [40] (the Court).

¹²³ (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

¹²⁴ *Vella* (2019) 269 CLR 219 at [157] (Gageler J) (citation omitted).

¹²⁵ *EGH19* (2026) 100 ALJR 400 at [318(1)] (Jagot J).

¹²⁶ See paragraph 33 above. See also in the context of extradition *United Mexican States v Cabal* (2001) 209 CLR 165 at [58]–[62] (Gleeson CJ, McHugh and Gummow JJ).

**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	Constitution	Current	Ch III	Currently in force	All relevant times
2.	<i>Bail Act 1982</i> (NT)	Current	ss 3, 3B, 8, 7A, 24, 24A, 28, 34, 35, 49	Currently in force	All relevant times
3.	<i>Evidence (National Uniform Legislation) Act 2011</i> (NT)	Current	ss 4, 8	Currently in force	All relevant times
4.	<i>Judiciary Act 1903</i> (Cth)	Current	s 68	Currently in force	All relevant times
5.	<i>Statute of Westminster I</i> , 3 Edw 1, c 12	As made	ch 15	Illustrative purposes	N/A
6.	<i>An act for preventing the vexatious Removal of Indictments into the Court of King's Bench (etc)</i> , 5 & 6 Will 4, c 33	As made	s 3	Illustrative purposes	N/A
7.	<i>Indictable Offences Act 1848</i> , 11 & 12 Vict, c 47	As made	s 23	Illustrative purposes	N/A