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

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.

PARTS II AND III INTERVENTION

2. The Attorney General for New South Wales (**NSWAG**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant, the Northern Territory of Australia.

PART IV ARGUMENT

A INTRODUCTION

3. The Plaintiff's contention that s 7A(2AB) of the *Bail Act 1982* (NT) (**NT Bail Act**) substantially impairs the institutional integrity of the identified Territory courts is advanced solely on the basis that the law falls foul of the principle articulated in respect of Commonwealth laws in *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 173 CLR 1 at 26 and the decisions that have followed it (the ***Lim* principle**): **PS [7]-[14]**.

4. The submissions of the Northern Territory filed on 23 July 2026 (**DS**) set out why the Plaintiff's challenge to s 7A(2AB) of the NT Bail Act must fail. Those submissions: (i)

explain that there is no common law right to bail and that there is a long history of legislatures intervening to regulate the circumstances in which bail will be granted (**DS [18]-[37]**); (ii) show that s 7A(2AB) does not itself authorise detention but rather is a provision that regulates the availability of bail in respect of detention otherwise authorised by law (**DS [52]-[56]**); (iii) explain that, even though s 7A(2AB) and other provisions of the NT Bail Act alter the conditions under which bail may be granted, that does not mean that, when the scheme is considered in its entirety: (A) the purpose of holding a person in detention on remand is other than for the purpose of ensuring that they are available to be tried; and (B) such detention is not reasonably capable of being seen as necessary for that purpose (**DS [57]-[73]**). It follows from these points that s 7A(2AB) of the NT Bail Act would not contravene the *Lim* principle even if it were enacted by the Commonwealth Parliament: **DS [74]-[75]**.

5. For those reasons, there is no need for this Court to determine the extent to which the *Lim* principle should inform the application of the doctrine in ***Kable*** *v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 or whether a breach of the *Lim* principle in this case should lead to the conclusion that s 7A(2AB) substantially impairs the institutional integrity of the courts to which it applies. In the unlikely event that the Court reaches those questions, the NSWAG adopts the Northern Territory's submissions at **DS [76]** – that the impugned law does not impair the court's institutional integrity in the relevant sense – and advances the following further submissions:

   (a) ***First***, although Ch III of the Constitution "establishes an integrated court system",[1] it also assumes that States and Territory courts will remain constituent parts of distinct polities. The *Kable* doctrine should not be applied in a way that too narrowly circumscribes the capacity of the States and Territories to structure their constitutional arrangements relating to the administration of justice (see section B below).

   (b) ***Secondly***, the conclusion that the *Lim* principle does not apply directly to State and Territory laws that authorise courts to impose detention (see **DS [75]**) is supported by: (i) the absence of the rationale for that principle under the constitutional arrangements that obtain for the States and Territories; and (ii) the need for the States and Territories to retain greater flexibility than the Commonwealth in structuring arrangements for their essential organs of government, as described in the first section of these

[1] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

submissions, which weighs against acceptance of the *Lim* principle as a defining characteristic of *all courts* to be applied as a uniform requirement at the State and Territory level (see section C below).

(c) ***Thirdly***, the history and diversity of bail laws in place across the Federation demonstrates that: (i) the criteria for the availability of bail represent a core element of a system for the administration of justice; and (ii) there is a range of approaches concerning bail across various jurisdictions, most of which involve consideration of matters, such as community safety or (in the defendant's favour) the interests of the defendant and their family, which are not directly tied to ensuring the defendant is available for trial. Nevertheless, each law represents the legislature's assessment of the extent to which it is willing to tolerate the risk that an accused person will not be available, having regard to the presence or absence of such matters. To the extent that it is appropriate to apply the *Lim* principle, s 7A(2AB) sits within the range of permissible options available to State and Territory legislatures (see section D below).

6. The NSWAG does not advance any submissions on the question of the Plaintiff's standing: see **PS [5]-[6]**; **DS [5]-[8]**.

B THE OPERATION OF *KABLE* WITHIN A FEDERAL SYSTEM

(i) Kable – basic principles

7. The doctrine of the "strict separation of Commonwealth judicial power",[2] which is commonly referred to as the "*Boilermakers* doctrine", consists of two related principles: (i) the judicial power of the Commonwealth may only be vested in "a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State"; and (ii) the Commonwealth Parliament may only confer judicial power, or a power incidental thereto, on those courts.[3] The independence of the judiciary, which is protected by the separation of powers, "is especially important in a federal system".[4] This is because, under such a system, "the ultimate responsibility of deciding upon the limits of the respective powers of the governments" is "placed in the federal judicature".[5]

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2 *SDCV v Director-General of Security* (2022) 277 CLR 241 at [171] (Gageler J).

3 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (***Boilermakers Case***) at 269-270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See, also, ***EGH19*** *v Commonwealth* (2026) 100 ALJR 400 at [281]-[283] (Jagot J).

4 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 12-13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

5 *Boilermakers Case* (1956) 94 CLR 254 at 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

8. However, it is also the case that federalism requires "the conception of a central government and a number of State governments separately organized"; indeed the Constitution is predicated on the States' "continued existence as independent entities".[6] This includes that the States must retain the capacity to structure "their constitutional arrangements relating to the administration of justice"[7] (including State courts, which are among the "essential organs of government"[8]).

9. Necessarily, the fact that "[t]he constitution and organisation of State courts is a matter for State legislatures"[9] modifies the strictness of the separation of powers provided for by Ch III. This is because s 77(iii) of the Constitution contemplates that "any court of a State" may be vested with federal jurisdiction by way of the "autochtonous expedient".[10] "There was at Federation no doctrine of separation of powers entrenched in the constitutions of the States",[11] and that remains the case today.[12] Similarly, no strict separation of powers doctrine applies to the Northern Territory.[13] It follows that the judicial power of the Commonwealth may be vested in a State or Territory court that also exercises *non-judicial power*.[14] Thus, Ch III of the Constitution is framed on the basis that federal judicial power is sufficiently robust that it can tolerate being conferred on, and exercised by, courts with more diverse characteristics and powers than Commonwealth Parliament could enact for federal courts.[15]

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6 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J).

7 ***Austin*** *v Commonwealth* (2003) 215 CLR 185 at [228] (McHugh J). See, also, [147] (Gaudron, Gummow and Hayne JJ); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 80 (Dixon J), 99-110 (Williams J).

8 *Austin* (2003) 215 CLR 185 at [166] (Gaudron, Gummow and Hayne JJ), quoting *State Chamber of Commerce & Industry v Commonwealth* (1987) 163 CLR 329 at 362-363 (Brennan J).

9 ***Forge*** *v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [61] (Gummow, Hayne and Crennan JJ).

10 *Boilermakers Case* (1956) 94 CLR 254 at 268.

11 *South Australia v* ***Totani*** (2010) 242 CLR 1 at [66] (French CJ), citing *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees' and Builders Labourers' Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; and *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652.

12 *Kable* (1996) 189 CLR 51 at 77-78 (Dawson J), 93 (Toohey J), 109, 118 (McHugh J)

13 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 38-39, 41-44 (Brennan CJ), 53-58, 62 (Dawson J), 141-142 (McHugh J), 170, 176 (Gummow J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [104]-[118] (Gageler J), [161]-[171] (Keane J).

14 See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika [No 1]***) at [20] (Kiefel CJ, Bell, Keane and Steward JJ).

15 In this regard, see *Assistant Commissioner Condon v* ***Pompano*** *Pty Ltd* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ): "in applying the notions of repugnancy and incompatibility it may well be necessary to accommodate the accepted and constitutionally uncontroversial performance by the State courts of functions which go beyond those that can constitute an exercise of the judicial power of the Commonwealth".

This is an integral part of the structure provided for by the Constitution (including Ch III).

10. In *Kable* this Court held that Ch III does circumscribe the power of "State Parliaments and Territory legislatures … in relation to the permissible structure of State and Territory courts" and "the content and manner of exercise of the State and Territory jurisdiction that can be conferred on State and Territory courts".[16] The textual basis for the *Kable* implication is that s 73 of the Constitution refers to "the Supreme Court of any State" and s 77(iii) refers to "any court of a State". The effect of the implication is that "it is beyond the legislative power of a State [or Territory] so to alter the constitution or character of" a court vested with federal judicial power such "that it ceases to meet the constitutional description" (of a "court").[17] Accordingly, the relevant principle:[18]

> … is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

11. The *Kable* principle recognises that "State courts, when exercising federal jurisdiction, 'are part of the Australian judicial system created by Ch III of the Constitution and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States'".[19] The principle has a harmonising effect by "integrat[ing] state courts within a uniform, national conception of what it means for an institution to be a 'court'".[20]

(ii) ***States and Territories have some measure of freedom with respect to the organisation and arrangements of their court systems***

12. There are nonetheless well-accepted limits on *Kable*'s homogenising influence. McHugh J explained in ***Fardon*** *v Attorney-General (Qld)* that:[21]

> It is a serious constitutional mistake to think that either *Kable* or the Constitution assimilates State courts or their judges and officers with federal courts and their judges and officers. The Constitution provides for an integrated court system. But that does not mean that what federal courts cannot do, State courts cannot do. Australia is governed by a federal, not a unitary, system of government.

16 ***Garlett*** *v Western Australia* (2022) 277 CLR 1 at [116] (Gageler J).

17 *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

18 *Forge* (2006) 228 CLR 45 at [63].

19 ***Wainohu*** *v New South Wales* (2011) 243 CLR 181 at [45] (French CJ and Kiefel J), quoting *Kable* (1996) 189 CLR 51 at 103 (Gaudron J).

20 B Lim, "Laboratory Federalism and the *Kable* Principle" (2014) 42 *Federal Law Review* 519 at 520.

21 (2004) 223 CLR 575 at [36].

13. The plaintiff acknowledges at **PS [12]** that "*Kable* does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III".[22] It is well accepted that the *Kable* limitation is "more closely confined" than the strict separation of powers at the federal level.[23] Indeed, that proposition is the necessary premise for the Court's observation in *HA Bachrach Pty Ltd v Queensland*, which has been endorsed in a number of subsequent authorities,[24] that the "occasion for the application of *Kable* does not arise" if the impugned State law would not infringe Ch III had it been enacted by the Commonwealth Parliament for a Ch III court.[25]

14. Importantly, the authorities acknowledge that the *Kable* limit "makes ample allowance for diversity in the constitution and organisation of courts".[26] As French CJ and Kiefel J said of the *Kable* principle in *Wainohu*:[27]

> The principle does not apply so as to infringe the freedom that State legislatures enjoy with respect to the organisation and arrangements of their courts. It is not a surrogate for the application of a separation of powers doctrine to the States. Allowance must be made in assessing incompatibility for the long history in the States of the appointments of judges to extra-judicial roles, a history which predates Federation. It is necessary to bear in mind the caution issued by the late Professor Enid Campbell:
>
> > "While the incompatibility doctrine is meant to be protective of judicial institutions, it has the potential of being applied by courts in ways that some might regard as over-protective of those institutions and insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform."

15. All of this flows from the fact that the *Kable* implication must be given effect within a

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22 *Fardon* (2004) 223 CLR 575 at [86] (Gummow J). See, also, [198] (Hayne J), [219] (Callinan and Heydon JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [84] (French CJ); *Wainohu* (2011) 243 CLR 181 at [43], [45] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38 at [22] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629 at [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and the authorities cited at n 11 above.

23 *Kable* (1996) 189 CLR 51 at 104 (Gaudron J). See, also, ***Baker*** *v The Queen* (2004) 223 CLR 513 at [51] (McHugh, Gummow, Hayne and Heydon JJ); *Fardon* (2004) 223 CLR 575 at [144(5)] (Gummow J), [219] (Callinan and Heydon JJ); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [137] (Gordon J); *Garlett* (2022) 277 CLR 1 at [184] (Gordon J).

24 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at [10] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Baker* (2004) 223 CLR 513 at [22]-[24] (McHugh, Gummow, Hayne and Heydon JJ); *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ); *Benbrika [No 1]* (2021) 272 CLR 68 at [82] (Gageler J), [158] (Gordon J); *Garlett* (2022) 277 CLR 1 at [121] (Gageler J).

25 (1998) 195 CLR 547 at [14].

26 *Totani* (2010) 242 CLR 1 at [68] (French CJ).

27 (2011) 243 CLR 181 at [52] (footnotes omitted). See, also, *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at [3], [5] (Gleeson CJ).

federation, which "is a system of government permitting diversity".[28] It reflects that "[i]n giving meaning to the constitutional expression 'court of a state', meaning must be given not only to the word 'court' but to the words 'of a State'".[29]

C THE RATIONALE FOR THE *LIM* PRINCIPLE DOES NOT OBTAIN AT THE STATE AND TERRITORY LEVEL

(i) Rationale for the Lim principle

16. As noted at **DS [75]**, in *Garlett*, three members of this Court said that "the *Lim* principle has no application to establish the invalidity"[30] of a State law. The NSWAG's position is that, consistent with this observation, there can be no application of the *Lim* principle in respect of State and Territory legislation that confers power on a State or Territory court to authorise detention even if framed as part of the *Kable* analysis.

17. To understand why that is so, it is necessary to consider the rationale for the principle expounded in *Lim* that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[31] That an exclusively judicial function such as punishment can only be conferred by the Commonwealth Parliament on a Ch III court was an unsurprising outworking of the first aspect of the *Boilermakers* doctrine (see [7] above).

18. The implications of the *Lim* principle have been elaborated upon by this Court in recent decisions.[32] Two points are of particular relevance:

19. ***First***, Ch III requires "that it would be beyond the power of the [Commonwealth] Parliament to invest the executive with an arbitrary power of detention even if the power was stated in

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28 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343 at [61] (Heydon J).

29 Lim, "Laboratory Federalism and the *Kable* Principle" at 522. See, also, the observation of Isaacs J in *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437 at 452 that, although the Commonwealth Constitution enables the Commonwealth Parliament to use the judicial services of State courts, it "recognizes in the most pronounced and unequivocal way that they remain 'State Courts'".

30 (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ).

31 *Lim* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ). See, also, ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [28] (The Court).

32 See *Benbrika [No 1]* (2021) 272 CLR 68; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 (***Benbrika [No 2]***); *Jones v Commonwealth* (2023) 280 CLR 62; *NZYQ* (2023) 280 CLR 137; ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; and *EGH19* (2026) 100 ALJR 400.

terms divorced from punishment and criminal guilt".[33] This aspect of the *Lim* principle has been justified on the basis that "Ch III is concerned with substance and not mere form".[34] It is achieved by treating as "punitive" any law:[35]

> … that deprives a person of basic or fundamental rights or privileges for legitimate, non-punitive, purposes but is not reasonably capable of being seen as necessary for those legitimate purposes. Sometimes, provisions in this class are described as "prima facie" punitive. Sometimes, they are, in effect, deemed to be punitive.

20. ***Secondly***, even though the imposition of punishment is an exclusively judicial function, that does not mean that a law that imposes punishment will necessarily be valid merely because it confers the penal or punitive function *on a court*.[36] A curial power to impose punishment other than as part of the adjudgment and punishment of criminal guilt sits outside the ordinary "constitutional paradigm"[37] and so will nonetheless call for justification.

21. Together, the effect of these principles is that Ch III forbids not only "veiled, or disguised, attempts by the legislature or executive to impose" punishment as retribution for breaches of the law but also punitive detriments imposed "for no reason at all' or "justified only on grounds that can be regarded as arbitrary or illegitimate".[38] In the result, this means that "there are some functions (and some functions performed in a particular way) that cannot be conferred" by the Commonwealth Parliament "upon *either* the judiciary or the executive".[39]

22. It is doubtful that this lacuna in Commonwealth legislative power can be "satisfactorily explained simply by the observation that detention imposed as punishment is an exclusively judicial power".[40] Two explanations have been posited. ***First***, some members of this Court

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33 *Benbrika [No 1]* (2021) 272 CLR 68 at [18] (Kiefel CJ, Bell, Keane and Steward JJ). See, also, *Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

34 *NZYQ* (2023) 280 CLR 137 at [28] (The Court).

35 *Jones v Commonwealth* (2023) 280 CLR 62 at [149] (Edelman J). See, also, [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *EGH19* (2026) 100 ALJR 400 at [13] (Gageler CJ and Gleeson J), [83]-[84] (Gordon J), [257]-[258] (Steward J), [296] (Jagot J), [360] (Beech-Jones J).

36 See *EGH19* (2026) 100 ALJR 400 at [23] (Gageler CJ and Gleeson J).

37 *EGH19* (2026) 100 ALJR 400 at [16] (Gageler CJ and Gleeson J).

38 G Appleby and S McDonald, "Punishment and Chapter III of the Constitution" in J Griffiths and J Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (The Federation Press, 2020) at 64-65.

39 Appleby and McDonald, "Punishment and Chapter III of the Constitution" at 86. See, also, *EGH19* (2026) 100 ALJR 400 at [292] (Jagot J).

40 Appleby and McDonald, "Punishment and Chapter III of the Constitution" at 86. See, also, the observation on that page that "it seems unsatisfactory and artificial to suggest that 'arbitrary detention is to be characterised as an *exclusively judicial power*, yet one that can *never be exercised by courts*". See, also, *NZYQ* (2023) 280 CLR 137 at [52] (Edelman J); *ASF17 v Commonwealth* (2024) 282 CLR 172 at [70] (Edelman J); *YBFZ* (2024) 99 ALJR 1 at [92], [149], [161] (Edelman J); *EGH19* (2026) 100 ALJR 400 at [175]-[177] (Edelman J).

have suggested that this feature of the *Lim* principle is justified by a "concern for the protection of personal liberty",[41] which runs through "ancient principles of the common law"[42] and underpins the Constitution. ***Secondly,*** Edelman J has expressed the view that the limitation might be better conceptualised as arising from "the scope or boundaries of a head of power" under s 51 of the Constitution.[43] His Honour suggests that "a law that effects a large imposition or constraint, at least upon a person's bodily integrity or liberty, such as a serious violation of their liberty by custodial detention, may not be a law with respect to the relevant head of power to the extent that the imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law".[44]

23. The second basis clearly could not justify the extension of the *Lim* principle to the States and Territories, which enjoy plenary legislative power.[45] The plaintiff appears to rely on the first basis (see **PS [10]-[12]**). For the reasons that follow, it could not justify the direct application of the *Lim* principle (as explained at [18]-[21] above) in respect of State and Territory courts.

(ii) The Lim principle does not inform the defining characteristics of courts

24. It may be accepted that: (i) at the Commonwealth level, the doctrine of the separation of powers is the "constitutional emanation" of an underlying compact between the individual and the state that gives primacy to liberty;[46] and (ii) the common law as applied by the courts "is very jealous of any infringement of personal liberty".[47] However, there are problems in suggesting that from these two propositions can be distilled a further principle that constrains the power of State and Territory legislatures to determine what courts can do – in particular, excluding the deprivation of basic or fundamental rights except as an incident of the adjudgment and punishment of criminal guilt or where it is reasonably necessary for a legitimate and non-punitive purpose – in the name of protecting liberty.

25. ***First***, on its own, an object of the *Boilermakers* doctrine – i.e. the protection of liberty –

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41 *NAAJA* (2015) 256 CLR 569 at [94] (Gageler J). See, also, *Garlett* (2022) 277 CLR 1 at [125]-[134] (Gageler J), [174]-[178] (Gordon J); *EGH19* (2026) 100 ALJR 400 at [291] (Jagot J).

42 *YBFZ* (2024) 99 ALJR 1 at [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ), quoting ***Re Bolton****; Ex parte Beane* (1987) 162 CLR 514 at 520-521 (Brennan J). See, also, *Garlett* (2022) 277 CLR 1 at [127] (Gageler J); *EGH19* (2026) 100 ALJR 400 at [67]-[69] (Gordon J).

43 *YBFZ* (2024) 99 ALJR 1 at [150].

44 *YBFZ* (2024) 99 ALJR 1 at [150].

45 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10 (The Court); *Duncan v New South Wales* (2015) 255 CLR 388 at [37] (The Court); *NAAJA* (2015) 256 CLR 569 at [170]-[171] (Keane J).

46 *YBFZ* (2024) 99 ALJR 1 at [13] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19* (2026) 100 ALJR 400 at [73] (Gordon J).

47 *Re Bolton* (1987) 162 CLR 514 at 523 (Brennan J).

provides too infirm a basis from which to extrapolate a hitherto unrecognised constitutional implication that limits what State and Territory courts can do. As Edelman J observed in *Benbrika [No 2]*, "it is not a proper method of constitutional interpretation to use a higher-level purpose of a separation of powers implication that is heavily based upon constitutional structure as a means to supply an independent implication capable of direct application".[48]

26. That is especially so where there are no structural features in the Commonwealth, State or Territory constitutions that support the existence of that implication. Quite to the contrary, as noted at [9] above, those constitutions are framed deliberately on the basis that the States and Territories are <u>not</u> subject to a separation of powers doctrine. Ultimately, the object of protecting liberty underpins, but cannot be relied upon to override, the structure of the Constitution as described at [9] above.

27. ***Secondly***, even if one were to assume that, when assessing whether a posited constitutional limit should be accepted, "the protection of individual rights is … the object of the inquiry",[49] it must nonetheless be the case that that assessment is to be undertaken having regard to the broader "constitutional context"[50] in which a court exists. Relations as between courts and the legislative and executive branches at the State and Territory level are different to those that obtain at the federal level. In particular, there is no constitutional impediment to a State or Territory law authorising a person or entity other than a State court to impose a punitive detriment.[51] Therefore, circumscribing the capacity of State and Territory courts to impose punitive detriments is not necessarily protective of liberty because it "is likely to tempt the States into legislating to exert their coercive power through means other than their courts".[52] An "over-protective" approach to State and Territory courts (in the words of Professor Campbell), not only risks trenching on the legitimate "assessments of elected parliaments about what functions are appropriate for courts to perform" (see [14] above), but also may encourage the enactment of legislation that is *less protective* of individuals' rights.

28. In *Vella*, the plurality said of the power to make preventive orders that:[53]

48 (2023) 280 CLR 1 at [86]. See, also *YBFZ* (2024) 99 ALJR 1 at [184] (Steward J); *EGH19* (2026) 100 ALJR 400 at [153] (Edelman J).

49 *YBFZ* (2024) 99 ALJR 1 at [240] (Beech-Jones J).

50 *Fardon* (2004) 223 CLR 575 at [2] (Gleeson CJ).

51 *Fardon* (2004) 223 CLR 575 at [2] (Gleeson CJ), [40] (McHugh J); *Garlett* (2022) 277 CLR 1 at [301] (Gleeson J).

52 *Totani* (2010) 242 CLR 1 at [247] (Heydon J), see also ***Thomas*** *v Mowbray* (2007) 233 CLR 307 at [17] (Gleeson CJ); ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [158] (Gageler J).

53 (2019) 269 CLR 219 at [90] (Bell, Keane, Nettle and Gordon JJ), referring to orders made under the

There are good reasons why such powers, if they are to exist, should be exercised by the judiciary. A person subject to an exercise of judicial power should have the power to obtain legal representation, the benefit of a hearing with fair process and generally held in public, an entitlement to written reasons for the decision as to the orders made which demonstrate the application of general rules to the facts of the case, and a power of appeal or to seek leave to appeal.

29. The same is true generally of laws that deprive individuals of fundamental rights. Given that State and Territory parliaments have power to enact laws that "affect the liberty of the individual", this Court should be slow to limit the capacity of State and Territory parliaments to ensure that such powers are "exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government".[54]

30. These considerations further underscore why State and Territory legislatures should be permitted a greater degree of latitude than the Commonwealth Parliament in determining what rights-depriving functions are appropriate for State and Territory courts to perform. This greater breadth of functions that State and Territory courts can exercise in this regard is required by the Constitution because: (i) those courts are constituent parts of polities with a different constitutional structure to the Commonwealth; (ii) under that different constitutional structure, there are sound functionalist reasons[55] why State and Territory courts should be permitted to perform those functions (see [27]-[29] above); and (iii) permitting this kind of diversity thus enables State and Territory courts to be more effective organs of government in their particular constitutional context (that is, to be not just *courts* of a State, but courts *of a State*: see [12]-[15] above).[56]

Crimes (Serious Crime Prevention Orders) Act 2016 (NSW) which can impose various prohibitions, restrictions and requirements short of detention. See, also, *EGH19* (2026) 100 ALJR 400 at [26]-[27] (Gageler CJ and Gleeson J).

54 *Thomas* (2007) 233 CLR 307 at [12] (Gleeson CJ). See also *Fardon* (2004) 223 CLR 575 at [2] (Gleeson CJ).

55 cf *Wainohu* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J).

56 Indeed, the Court will be familiar with the range of legislative schemes pursuant to which State and Territory courts authorise detention or otherwise constrain liberty other than as part of the adjudgment or punishment of criminal guilt. In New South Wales alone these include: apprehended violence orders (s 35) and serious domestic abuse prevention orders (s 87B) under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); extended supervision orders (s 5B) and continuing detention orders (s 5C) under the *Crimes (High Risk Offenders) Act 2006* (NSW); extended supervision orders (s 20) and continuing detention orders (s 34) under the *Terrorism (High Risk Offenders) Act 2017* (NSW); preventative detention orders under Pt 2A of the *Terrorism (Police Powers) Act 2002* (NSW); control orders under s 19 of the *Crimes (Criminal Organisations Control) Act 2012* (NSW); serious crime prevention orders under s 5 of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW); and orders authorising detention of persons in mental health facilities under s 19 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

31. ***Thirdly***, it is important to return to what is the ultimate question in applying the *Kable* doctrine: whether the law in question deprives the court of its "defining" characteristics such that it ceases to be "a court" for Ch III purposes: at [10] above. A law which undermines a court's independence and impartiality has obvious implications for its status as a "court". By contrast, a law which (according to the Plaintiff's argument) confers a power of detention on a court which is inappropriately calibrated to the end it serves does not strike at the characteristics of the court itself such as to raise a question about whether it remains an appropriate repository of federal jurisdiction.

32. All of this confirms that the constraints on Commonwealth Parliament arising from the *Lim* principle are not determinative of the outer limits of what functions may be conferred by State and Territory parliaments on State and Territory courts. As Gleeson J said in *Garlett*:[57]

> … 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 …

D FURTHER OBSERVATIONS CONCERNING THE HISTORY AND DIVERSITY OF BAIL LAWS

33. The Northern Territory has set out at **DS [18]-[37]** the very long history dating back at least to the thirteenth century of legislation that has regulated the availability of bail (including by making certain offences not bailable[58]). That various Parliaments have, over many centuries, sought to regulate the criteria for granting bail is an unsurprising reflection of the fact "that bail is one of the most important aspects of criminal procedure".[59]

34. Laws like s 7A(2AB) of the NT Bail Act, which provide for the criteria for granting bail, fall within the category of legislation in respect of which the States and Territories ought to be permitted "to engage in their own legislative experiments"[60] (see [12]-[15] above). "How far bail law should go in protecting the community against the risk of other offences, in protecting a particular individual from harm and in protecting the integrity of the trial

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[57] (2022) 277 CLR 1 at [294]. See, also, [247] (Edelman J).

[58] In this regard, see, also KX Metzmeier, "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" (1996) 8(2) *Pace International Law Review* 399 at 402-403; *Justices Act 1902* (NSW), s 44 (as originally enacted).

[59] Sir Leslie Herron, "Chairman's Opening Address", *University of Sydney – Proceedings of the Institute of Criminology: Seminar on Bail* (1969) at 13. See, also, the NSW Parliament's *Report of the Bail Review Committee* (Report No 46 of 1976) (**Bail Review Committee Report**), which was prepared as part of the process that ultimately resulted in the enactment of the *Bail Act 1978* (NSW) and states at p 11 that "[i]t is difficult to overstate the importance of bail".

[60] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343 at [61] (Heydon J).

process"[61] are matters for political judgment that the State and Territory legislatures are best placed to assess (including because conditions in each of the States and Territories may alter the relative significance of these considerations).

35. A review of the bail laws in force across the Federation reveals a considerable diversity in approaches that have been taken in different jurisdictions. For example:

36. **NSW:** The Preamble to the *Bail Act 2013* (NSW) (**NSW Bail Act**) confirms – consistent with the account of bail laws given at [34] above – that, in enacting that legislation, the Parliament of New South Wales has had regard to, and sought to balance, multiple objectives including "the need to ensure the safety of victims of crime, individuals and the community"; "the need to ensure the integrity of the justice system"; and "the common law presumption of innocence and the general right to be at liberty".[62] The balance struck is given expression in the provisions that follow, which include a "right to release" for certain offences (such as fine-only offences): s 21. For all other offences, a bail authority must refuse bail if satisfied – having regard to the matters in s 18, which include "any special vulnerability or needs the accused person has" (sub-s (1)(k)) and "the need for the accused person to be free for any other lawful reason" (sub-s (1)(m)) – that there is an unacceptable risk that the accused person, if released from custody, will: fail to appear at any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence (see ss 17, 19(1)-(2)). In addition, certain offences are nominated as "show cause offences" (see s 16B) in respect of which the accused person bears the onus to "show[] cause why his or her detention is not justified" (s 16A(1)).

37. **South Australia:** Under the *Bail Act 1985* (SA) bail authorities should release applicants on bail unless, having regard to various matters (including the gravity of the offence; the likelihood that the applicant will abscond, offend again, or interfere with evidence; any need that the applicant may have for physical protection; and any medical or other care the applicant may require), a bail authority considers the applicant should not be released (s 10(1)). There is also a presumption against bail for more serious offences under s 10A.

38. **Queensland:** Under s 16(1) of the *Bail Act 1980* (Qld) a court or police officer shall refuse bail if they are satisfied: (i) that there is an unacceptable risk that the defendant if released

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61 New South Wales Law Reform Commission, *Report 133: Bail* (April 2012) at [2.40], see also [2.38].

62 The Preamble was inserted by the *Bail Amendment Act 2014* (NSW), which repealed the original statement of legislative purpose in s 3(2) of the NSW Bail Act as made: "A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty".

on bail: (A) would fail to appear and surrender into custody; or (B) would, while released on bail: commit an offence; endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or interfere with witnesses or otherwise obstruct the course of justice whether for the defendant or anyone else. In making that assessment, regard is to be had to a range of matters including the nature and seriousness of the offence, the defendant's background, and the likely effect refusal of bail would have on a person with whom the defendant is in a family relationship and for whom the defendant is a primary caregiver (s 16(2)); or (ii) that the defendant should remain in custody for the defendant's own protection. For certain types of offences nominated in s 16(3) the court or police officer shall refuse to grant bail unless the defendant shows cause why detention is not justified.

39. **ACT:** Under the *Bail Act 1992* (ACT) there is an entitlement to bail for minor offences (see s 8). For other offences there is generally a presumption for bail unless the court or authorised officer is satisfied that refusal is justified having regard to nominated factors (which include: the likelihood of the person appearing in court in relation to the offence; the likelihood of the person, while released on bail, committing an offence, harassing or endangering the safety or welfare of anyone, or interfering with evidence; and the interests of the person): ss 9A, 22(1). For murder and certain serious drug offences, and also serious offences committed while a charge for another serious offence is pending or outstanding, a court or an authorised officer must not grant bail to the accused person unless satisfied that special or exceptional circumstances exist favouring the grant of bail (ss 9C, 9D).

40. None of the bail statutes in Australia conditions the availability of bail solely on the basis of whether detention is necessary to ensure that an accused person is available to be dealt with by the courts (that is, the "availability purpose" relied on at **PS [21]**). Indeed, if the focus was required to be solely on achieving the availability purpose, then some aspects of the bail statutes that are *favourable* to accused persons – for example, entitlement to bail for minor offences or a requirement to consider the interests of the accused person – would have no role to play in these laws.

41. The Plaintiff observes at **PS [41]** that "no grant of bail is risk free".[63] Against that background, each of the State and Territory bail statutes must be understood as representing a bespoke determination as to the extent to which the relevant polity is willing to tolerate the

[63] *Williamson v DPP (Qld)* [2001] 1 Qd R 99 at [21] (Thomas JA, McPherson JA agreeing).

risk that an accused person will not be available for trial, having regard to the presence or absence of a variety of other factors.

42. The Northern Territory explains at **DS [52]-[56]** that s 7A(2AB) of the NT Bail Act is not a law that *authorises* detention. Rather, it is a law pursuant to which Parliament has expressed its view that, for nominated offences, it is unwilling to tolerate a risk that an accused person may be unavailable to stand trial unless the member or court is satisfied to a high degree of confidence that the person will not, if released on bail, commit a prescribed offence or a serious violence offence; or otherwise endanger the safety of the community.

43. The function of determining whether bail should be granted by application of statutory criteria (including criteria directed at the safety of the community) has long been exercised by State and Territory courts.[64] In this case, the ordinary curial processes and procedures applicable to bail applications remain in place: see **DS [71]**. There is no suggestion that the requirement to form a state of satisfaction as to whether the Court has a "high degree of confidence" about the matters identified in s 7A(2AB) involves an unworkable or non-judicial standard: **DS [73]**.[65] Any submission to that effect would, in any event, be answered by the observation of Kiefel CJ, Keane and Steward JJ in *Garlett* "that 'open-textured criteria' – such as 'unacceptable risk to the safety, welfare or order of the community', 'reasonably necessary', 'reasonably appropriate and adapted', 'sufficient grounds' and 'considers appropriate' – have been deployed by the legislature to confer power on courts without falling foul of the concern"[66] that such powers cannot be exercised judicially.

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64 See, eg, *Bail Act 1978* (NSW), s 32(1)(c); *Bail Act 1977* (Vic), s 4(2)(d); *Bail Act 1980* (Qld), s 16(a)(ii)(B) (in each case as originally enacted). Note also that, as pointed out at **DS [76]**, the likelihood of an accused person committing an offence on bail was recognised as a legitimate bail consideration at common law. In this regard, it may be observed that the Bail Review Committee Report stated (at p 21) that the list of criteria which were in fact taken into account by courts in New South Wales prior to statutory codification in 1978 included "whether the offence was committed whilst on bail or parole"; "likelihood of other offences being committed by accused if bail is granted"; and "protection of the community".

65 As noted at **DS [50]**, the language of "high degree of confidence" was borrowed from s 22C(1) of the NSW Bail Act. That provision (which is to be repealed on 1 October 2026) – which it should be noted applies only to young persons (to whom the "show cause" requirements in Div 1A do not apply) that have been charged with a "relevant offence" (being a motor theft offence or serious breaking and entering offence) that is alleged to have been committed while they were on bail for another relevant offence – has been shown to be capable of application in a number of NSW authorities: see, eg, *RB v The King (No 2)* [2024] NSWSC 845 at [69]-[70] (Walton J); *R v KC* [2025] NSWSC 258.

66 (2022) 277 CLR 1 at [66], citing *Fardon* (2004) 223 CLR 575 at [22], [34], [225]; *Vella* (2019) 269 CLR 219 at [84]; *Thomas* (2007) 233 CLR 307; *Wainohu* (2011) 243 CLR 181; *Pompano* (2013) 252 CLR 38.

44. In light of these considerations, the proper conclusion is that no part of s 7A(2AB) of the NT Bail Act substantially impairs the institutional integrity of the relevant Territory courts. It is a law of a familiar kind: a statutory provision that modifies the availability of bail so as to reflect the Parliament's determination as to the proper relative weighting of competing policy considerations (see [34] above). It represents a legislative fine-tuning of the operation and structure of the Northern Territory's criminal justice system of a kind that the *Kable* principle is capable of accommodating (as explained at [12]-[15] above).

45. If it be legitimate to go beyond the traditional *Kable* analysis to apply the *Lim* principle directly to determine the validity of a State or Territory law (which the NSWAG denies for the reasons given above) then, as the Northern Territory submits at **DS [57]-[76]**, both: (i) the identification of the purpose for which accused persons are detained; and (ii) the assessment of whether the NT Bail Act is reasonably appropriate and adapted to the achievement of that purpose, must be undertaken by reference to the entirety of the statutory regime that authorises detention (not just s 7A(2AB) in isolation).

46. Once that exercise is undertaken it is clear that the insertion of s 7A(2AB) into the NT Bail Act did not transform the purpose for which accused persons are detained under that Act: **DS [59]-[62]**. To the extent that s 7A(2AB) goes further than other provisions of the NT Bail Act that the Plaintiff does not challenge (see **DS [44]-[46]**) then: (i) its effect is limited; and (ii) it has been introduced for a purpose – namely, protection of the community – that can legitimately be pursued by the legislature in combination with the availability purpose (see **DS [64]**). For these reasons, the NT Bail Act, as amended to include s 7A(2AB), authorises detention in a manner that is reasonably appropriate and adapted for a legitimate and non-punitive purpose.

PART V ESTIMATE

47. The NSWAG estimates that he will require up to 15 minutes to present his oral argument.

Dated 6 August 2026

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ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Constitution* (Cth)	Current	s 51, ch III	Currently in force	All relevant times
Northern Territory statutes					
2.	*Bail Act 1982* (NT)	Current	s 7A	Currently in force	All relevant times
New South Wales statutes					
3.	*Bail Act 2013* (NSW)	Current	Preamble, ss 16A, 16B, 17, 18, 19, 21, 22C	Illustrative purposes	N/A
4.	*Bail Act 2013* (NSW)	As made	s 3	Illustrative purposes	N/A
5.	*Bail Act 1978* (NSW)	As made	s 32(1)(c)	Illustrative purposes	N/A
6.	*Crimes (Criminal Organisations Control) Act 2012* (NSW)	Current	s 19	Illustrative purposes	N/A
7.	*Crimes (Domestic and Personal Violence) Act 2007* (NSW)	Current	ss 35, 87B	Illustrative purposes	N/A
8.	*Crimes (High Risk Offenders) Act 2006* (NSW)	Current	ss 5B, 5C	Illustrative purposes	N/A
9.	*Crimes (Serious Crime Prevention Orders) Act 2016* (NSW)	Current	s 5	Illustrative purposes	N/A

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
10.	*Justices Act 1902* (NSW)	As made	s 44	Illustrative purposes	N/A
11.	*Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW)	Current	s 19	Illustrative purposes	N/A
12.	*Terrorism (High Risk Offenders) Act 2017* (NSW)	Current	ss 20, 34	Illustrative purposes	N/A
13.	*Terrorism (Police Powers) Act 2002* (NSW)	Current	pt 2A	Illustrative purposes	N/A
Other statutes					
14.	*Bail Act 1992* (ACT)	Current	ss 8, 9A, 9C, 9D, 22(1)	Illustrative purposes	N/A
15.	*Bail Act 1980* (Qld)	Current	s 16	Illustrative purposes	N/A
16.	*Bail Act 1980* (Qld)	As made	s 16(1)(ii)(B)	Illustrative purposes	N/A
17.	*Bail Act 1985* (SA)	Current	ss 10, 10A	Illustrative purposes	N/A
18.	*Bail Act 1977* (Vic)	As made	s 4(2)(d)	Illustrative purposes	N/A