



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15/2025

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED

Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

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**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) to advance submissions in support of the Defendant.

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

- 10 4. The Plaintiff contends¹ that the power conferred by s 7A(2AB) of the *Bail Act 1982* (NT) (**the Bail Act**) substantially impairs the institutional integrity of several courts of the Northern Territory in breach of the *Kable* doctrine,² on the ground that s 7A(2AB) departs from the common law compact between individuals and the state that an individual “may ... be punished for a breach of the law, but ... for nothing else” (**the Compact**) recognised by this Court in *Lim*.³
5. South Australia adopts the submissions advanced by the Northern Territory for the propositions that s 7A(2AB) is not invalid because it does not confer authority upon the courts of the Northern Territory to detain (and, therefore, punish) persons awaiting trial,⁴ and, even if it did, such detention falls within the exceptional category recognised in *Lim* because it is reasonably capable of being seen to be appropriate and adapted to the non-punitive legitimate
- 20 end of ensuring the availability of defendants for trial.⁵
6. These submissions focus on the antecedent question raised by these proceedings, namely whether the Compact operates as a limitation upon the plenary legislative authority of the States and Territories. For the reasons that follow, South Australia contends that legislative adherence or departure from the Compact is not relevant in assessing whether a function conferred on a State or Territory court offends the *Kable* doctrine.

¹ *Submissions of the Plaintiff*, [10]-[11].

² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (**Kable**).

³ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (**Lim**), 27-28 (Brennan, Deane and Dawson JJ). The Compact was also articulated by Justices Brennan, Deane and Dawson, at page 27, in the following terms: “putting to one side the exceptional cases ... 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”.

⁴ *Submissions of the Defendant*, [52]-[56].

⁵ *Submissions of the Defendant*, [57]-[73].

7. The *Lim* principle, and its corollary (sometimes referred to as the allied *Lim* principle),⁶ have been recognised by this Court as means by which to supervise the separation of powers that operates under the *Constitution* at the federal level. However, the Plaintiff disavows any reliance on the separation of powers doctrine and accepts the long-standing and orthodox proposition that Chapter III does not impose a separation of powers upon the State and Territory constitutions.⁷
8. Rather, the Plaintiff seeks to expand the operation of the *Kable* doctrine, and correspondingly diminish the legislative capacity of the States and Territories, by incorporating the Compact within it. It seeks to do so by elevating the Compact, which is grounded in “ancient principles of the common law”, into a defining characteristic of State and Territory courts.⁸
9. The expansion contended for by the Plaintiff should be rejected as being inconsistent with (i) the textual and structural foundations of the institutional integrity doctrine, (ii) the principled development of the institutional integrity doctrine, and (iii) fundamental concepts of legislative supremacy that operate under our system of representative and responsible government.

The textual and structural foundation of the institutional integrity principle

10. The textual foundation of the institutional integrity principle is the consistent use of the term “court” in Chapter III of the *Constitution* to describe those institutions upon which the federal judicial power may be vested:⁹ “in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.”¹⁰

⁶ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 91 [19], 95 [28] (Kiefel CJ, Bell, Keane and Steward JJ) (***Benbrika No 1***).

⁷ *Submissions of the Plaintiff*, [12]. *Kable* (1996) 189 CLR 51, 65 (Brennan CJ), 81, 85-86 (Dawson J), 93 (Toohey J), 103-104 (Gaudron J), 109, 118 (McHugh J); *Fardon v Attorney-General* (2004) 223 CLR 575, 598 [37] (Gleeson CJ), 614 [86] (Gummow J), 655-656 [219] (Callinan and Heydon JJ) (***Fardon***); *South Australia v Totani* (2010) 242 CLR 1, 45 (French CJ) (***Totani***); *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 212 [52] (French CJ and Kiefel J) (***Wainohu***); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 625 [146] (Keane J) (***NAAJA***); *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 368 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 430 (Heydon J); *Condon v Pompano* (2013) 252 CLR 38, 53 [22] (French CJ), 89 [124] (Hayne, Crennan, Kiefel and Bell JJ) (***Pompano***); *Pollentine v Bleijie* (2014) 253 CLR 629, 648-649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Benbrika No 1* (2021) 272 CLR 68, 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ).

⁸ *Submissions of the Plaintiff*, [7]-[12], citing *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 9 [6], 20 [67]-[69] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

⁹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67-68 [41] (Gleeson CJ), 73-76 [57]-[63] (Gummow, Hayne and Crennan JJ), 136 [237]-[238] (Callinan J agreeing) (***Forge***); *Totani* (2010) 242 CLR 1, 157 [427] (Crennan and Bell JJ); *EGH19 v Commonwealth* (2026) 100 ALJR 400, 465 [288] (Jagot J) (***EGH19***).

¹⁰ *Constitution*, s 71. See also, ss 73, 75, 76 and 77(iii).

11. The institutional integrity principle serves a basal federal purpose. It ensures that those courts that are, or may be, conferred with federal jurisdiction possess the requisite degree of independence and impartiality to perform that constitutional function. The doctrine was necessary, as a matter of constitutional design, to ensure that the people and politics of the new federation could be confident that federal disputes would not become beholden to parochial interests. That purpose was reflected in the following contribution of Sir Edmund Barton at the Adelaide Convention:¹¹

10 It seems to me that if we are to have Federation in all its strength and power we are forced to the conclusion that the power which will best hold the Federation together, and will best preserve the honor of the Constitution, is the peaceful arbitrament of a Federal Court ... One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere.

12. This federal purpose remains vital. As Justice Kirby explained in *Forge*:¹²

20 It is the federal character of the Australian Constitution that necessitates, more than in nations differently organised, a judiciary that can decide federal contests in a way that is accepted by all participants in the polity. Given the necessity of drawing lines that mark off the governmental powers respectively of the Commonwealth, the States and the Territories, it is essential that there be an independent and impartial constitutional umpire for the disputes that inevitably occur. This is why federalism is legalism. It is why judicial review is an essential feature of governmental arrangements in a federal nation. The judges who perform the task of judicial review in such a polity must be, and be seen to be, legally competent, independent and impartial in the discharge of such functions.

13. Given its textual foundation and constitutional purpose, the institutional integrity principle operates as a restriction upon Commonwealth legislative power.¹³ The same principle applies to the courts of the Territories, as repositories of federal judicial power vested under s 122 of the *Constitution*.¹⁴ And, by virtue of the autochthonous expedient provided for by s 77(iii) of the *Constitution*, it also operates as a restriction on State legislative power.¹⁵

¹¹ Official Record of the Debates of the Australasian Federal Convention, Adelaide, 23 March 1897, 25 (Edmund Barton).

¹² *Forge* (2006) 228 CLR 45, 119 [185] (Kirby J in dissent, but not on this point), citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*Boilermakers*). See also, *Boilermakers* (1956) 94 CLR 254, 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *EGH19* (2026) 100 ALJR 400, 463 [281] (Jagot J).

¹³ *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (*Wilson*); *Garlett v Western Australia* (2022) 277 CLR 1, 88 [242] (Edelman J) (*Garlett*); *SDCV v Director-General of Security* (2022) 277 CLR 241, 281 [91] (Kiefel CJ, Keane and Gleeson JJ), 285 [106] (Gageler J), 303-304 [172], 305-306 [174] (Gordon J), 323-324 [225], 337 [267] (Edelman J) (*SDCV*).

¹⁴ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (*Bradley*).

¹⁵ *Kable* (1996) 189 CLR 51, 94-95 (Toohey J), 102-4 (Gaudron J), 110-111, 114-116 (McHugh J), 139-140 (Gummow J); *Pompano* (2013) 252 CLR 38, 105-106 [180]-[183] (Gageler J).

14. Consistent with the constitutional text of Chapter III and its constitutional purpose, the institutional integrity principle must be understood to apply in the same way to all courts within the integrated judicial structure. It does not operate in a less stringent fashion with respect to State or Territory courts.¹⁶ It is in this sense that it has been repeatedly, and correctly, observed that the *Constitution* does not allow for different grades of justice.¹⁷
15. The Plaintiff's challenge in the present case invites the Court to go further than is necessary to preserve the integrity of the courts of the Northern Territory in accordance with the textual and structural foundations of the institutional integrity doctrine. Determining whether a "person will not, if released on bail: (a) commit a prescribed offence or a serious violence offence; or
10 (b) otherwise endanger the community" for the purposes of s 7A(2AB) of the Bail Act will not undermine the capacity of those courts to function as independent and impartial institutions.

The principled development of the institutional integrity doctrine

16. Consistent with the textual and structural foundation of the institutional integrity doctrine, the authorities concerning institutional integrity have recognised a series of "essential characteristics"¹⁸ applicable to all "courts"¹⁹ that do, or may, exercise federal jurisdiction which sustain their institutional independence and impartiality:

16.1. The rule against bias, including the apprehended bias principle, recognises that the integrity of the judicial system is affected by the fact of, or the appearance of, a departure from the court's independence and impartiality.²⁰

¹⁶ Statements to the effect that the *Kable* doctrine is less strict (see, for example, *Kable* (1996) 189 CLR 51, 103-104 (Gaudron J); *Garlett* (2022) 277 CLR 1, 67 [184] (Gordon J)) are directed to the absence of a separation of powers applicable to State courts.

¹⁷ *Kable* (1996) 189 CLR 51, 103 (Gaudron J); *Fardon* (2004) 223 CLR 575, 617 [101] (Gummow J); *Wainohu* (2011) 243 CLR 181, 209-210 [45] (French CJ and Kiefel J), 228-229 [105] (Gummow, Hayne, Crennan and Bell JJ), 247 [171] (Heydon J); *Pompano* (2013) 252 CLR 38, 89 [123] (Hayne, Crennan, Kiefel and Bell JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 278 [147] (Gageler J) (*Vella*); *Benbrika No 1* (2021) 272 CLR 68, 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ); *Garlett* (2022) 277 CLR 1, 44 [115] (Gageler J), 66 [181], 74 [199] (Gordon J); *SDCV* (2022) 277 CLR 241, 269 [58] (Kiefel CJ, Keane and Gleeson JJ), 323 [222] (Edelman J); *CZA19 v Commonwealth* (2025) 99 ALJR 650, 668 [76] (Gordon J).

¹⁸ The terminology of "essential characteristic" is to be preferred to "defining characteristic" because the latter phrase may erroneously suggest that any departure from a rigidly defined standard will necessarily undermine the institutional integrity of a court. As Justice Edelman observed in *Garlett*, "[t]hese characteristics cannot always be treated as absolute requirements": *Garlett* (2022) 277 CLR 1, 88-89 [243] (Edelman J). See also, *Pompano* (2013) 252 CLR 38, 48 [5], 71-74 [67]-[72], 79-80 [88]-[89] (French CJ), 99-100 [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁹ *Wilson* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Garlett* (2022) 277 CLR 1, 88 [242] (Edelman J); *SDCV* (2022) 277 CLR 241, 281 [91] (Kiefel CJ, Keane and Gleeson JJ), 285 [106] (Gageler J), 303-304 [172], 305-306 [174] (Gordon J), 323-324 [225], 337 [267] (Edelman J).

²⁰ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181, 210 [44] (French CJ and Kiefel J); *NAAJA* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ).

16.2. The hearing rule promotes sound decision-making and ensures that a court must afford a hearing to all interested parties in a manner that promotes judicial legitimacy.²¹

16.3. The duty to give reasons promotes judicial transparency in a manner that facilitates scrutiny of judicial decision-making.²²

16.4. The open court principle subjects court proceedings to public and professional scrutiny, and thereby maintains public confidence in the integrity and independence of courts.²³

10 16.5. The tenure and remuneration requirements for judges ensure judicial independence from the executive and other sources of influence.²⁴

16.6. The rule against enlistment (and cloaking) also protects courts from the reality, or appearance, of executive influence.²⁵

17. The essential characteristics of a court are not closed.²⁶ New characteristics that sustain a court's actual and perceived independence and impartiality may emerge as judicial processes evolve to meet new challenges.²⁷ It is the touchstone of "independence and impartiality"²⁸ that orients this Court's jurisprudence concerning institutional integrity "in a principled, coherent, and systematic way".²⁹

18. This Court's jurisprudence concerning the institutional integrity implication has developed so as to ensure that courts within the integrated Australian judicial system are institutions

²¹ *Pompano* (2013) 252 CLR 38, 71 [67] (French CJ), 105 [169] (Hayne, Crennan, Kiefel and Bell JJ), 105 [177] (Gageler J).

²² *Wainohu* (2011) 243 CLR 181, 214-215 [56], 216 [58]-[59] (French CJ and Kiefel J); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278-279 (McHugh JA).

²³ *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ); *Wainohu* (2011) 243 CLR 181, 209 [44] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, 72 [67] (French CJ); *NAAJA* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ).

²⁴ *Forge* (2006) 228 CLR 45, 79-80 [74] (Gummow, Hayne and Crennan JJ), 123 [197], 127 [209], 135 [231] (Kirby J).

²⁵ *Kable* (1996) 189 CLR 51, 133 (Gummow J), quoting *Mistretta v United States*, 488 US 361, 407 (1989); *Totani* (2010) 242 CLR 1, 172 [479] (Kiefel J); *Wainohu* (2011) 243 CLR 181, 209 [44] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel and Bell JJ).

²⁶ *Bradley* (2004) 218 CLR 146, 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Pompano* (2013) 252 CLR 38, 72 [67] (French CJ).

²⁷ *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ); M Gordon, "The Integrity of Courts: Political Culture and A Culture of Politics" (2021) 44 *Melbourne University Law Review* 863, 868. See also, *Dietrich v The Queen* (1992) 177 CLR 292, 328 (Deane J).

²⁸ *Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45, 63 [28] (Gleeson CJ), 76 [64] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 591 [161]-[162] (Crennan J).

²⁹ *Vella* (2019) 269 CLR 219, 246 [56] (Bell, Keane, Nettle and Edelman JJ).

for the “administration of justice”³⁰ possessing the “capacity to administer the common law system of adversarial trial”.³¹ In none of the authorities referred to above, has this Court taken upon itself the role of striking down laws on the ground that the functions conferred were inconsistent with common law principle unless it could be demonstrated that the departure undermined independence and impartiality. As explained by Justice Gleeson in *Garlett*, this Court’s decision in *Kable* itself cannot be understood as authority for that approach.³²

Legislative supremacy

- 10 19. To extend the *Kable* doctrine beyond the touchstone of independence and impartiality, as a means of preventing the conferral of jurisdiction on State courts that are deemed to be too inconsistent with common law precepts, would draw this Court into controversies which do not find their answer in the text and structure of the *Constitution*. As members of this Court have repeatedly cautioned, the resolution of such controversies may themselves undermine judicial integrity.³³
20. Subject to constitutional limitations that are express or implied from the text and structure of the *Constitution*, it is a fundamental tenet of our system of government that it is not for the courts to scrutinise the “justice, wisdom, fairness or proportionality”³⁴ of statutes enacted in the exercise of plenary legislative power by the representative parliaments of the nation.³⁵

³⁰ *Harris v Caladine* (1991) 172 CLR 84, 92 (Mason CJ and Deane J); *NAAJA* (2015) 256 CLR 569, 618 [120] (Gageler J); *SDCV* (2022) 277 CLR 241, 325 [225] (Edelman J).

³¹ *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ). See also *Bradley* (2004) 218 CLR 146, 153 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Garlett* (2022) 277 CLR 1, 44-45 [117]-[118] (Gageler J).

³² *Garlett* (2022) 277 CLR 1, 110-111 [306]-[309] (Gleeson J); cf 50 [137] (Gageler J).

³³ *Baker v The Queen* (2004) 223 CLR 513, 519-520 [6] (Gleeson CJ), quoting *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ), 542-543 (Kirby J) (*Nicholas*); *Fardon* (2004) 223 CLR 575, 586 [2], 593 [23] (Gleeson CJ), 601 [41] (McHugh J); *Vella* (2019) 269 CLR 219, 235 [24], 256 [80] (Bell, Keane, Nettle and Edelman JJ), quoting *Fardon* (2004) 223 CLR 575, 586 [2], 593 [23] (Gleeson CJ) and *Nicholas* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

³⁴ *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 437-438 [80]-[81], 439 [85] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Statements to similar effect can be found in the following authorities: *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373, 409 (Latham CJ); *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon J); *Leask v Commonwealth* (1996) 187 CLR 579, 602 (Dawson J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Kuczborski v Queensland* (2014) 254 CLR 51, 99-100 [146], 116 [217], 119-120 [231] (Crennan, Kiefel, Gageler and Keane JJ).

³⁵ *The Queen v Burah* (1878) 3 App Cas 889, 904-905 (Lord Selborne for the Privy Council); *Hodge v The Queen* (1883) 9 App Cas 117, 132 (Lord Fitzgerald for the Privy Council); *Powell v Apollo Candle Co Ltd* (1885) App Cas 282, 290 (Sir Robert P Collier for the Privy Council); *Riel v The Queen* (1885) 10 App Cas 675, 678 (Lord Halsbury LC for the Privy Council).

21. Two implied constitutional limitations of relevance to the present case are the separation of powers doctrine and the institutional integrity doctrine. The separation of powers doctrine secures the Compact, relied upon by the Plaintiff, at the federal level, by prohibiting the Commonwealth Parliament and Executive from imposing punishments, and by requiring that the imposition of punishment by courts in the exercise of Commonwealth judicial power be done consistently with the Compact (exceptional cases aside).
22. By contrast, not only is there no stable foundation for the incorporation of the Compact into the institutional integrity doctrine, to accept the Plaintiff's submission would lead to very considerable constitutional uncertainty as to the ambit of that doctrine. If it is the role of this Court to determine whether a function conferred on a State or Territory court, that does not undermine its independence and impartiality, is too inconsistent with common law precepts, what other laws may be vulnerable to challenge? Would a law that authorised a State or Territory court to issue compensation for the acquisition of property other than on just terms be vulnerable to challenge?³⁶ Would a State or Territory law that imposed an excessive and disproportionate mandatory minimum penalty be invalid because it impaired the institutional integrity of the court called upon to administer it?³⁷
23. The logic which the Plaintiff invites the Court to adopt subverts the foundational principle that, under our system of government, the common law is subject to change by representative legislatures.³⁸ The compact that must predominate over all others is, of course, the *Constitution* itself.
24. South Australia does not submit that the Compact upon which the Plaintiff relies has no purchase in the States or Territories. It is a foundational convention. But, like most common law precepts it may be subjected to statutory modification or displacement.
25. The instability of the implication for which the Plaintiff contends is also apparent from its asymmetry. Acceptance of the Compact as an essential characteristic would only limit the capacity of *courts* to order detention other than in accordance with the Compact. It would

³⁶ *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469, 486 (Dixon CJ, McTiernan, Williams, Fullagar and Kitto J); *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 202 (Wilson J, Mason CJ agreeing at 195), 224 (Deane J), 241 (Dawson J); *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399, 425 [56] (Gaudron, McHugh, Gummow and Hayne JJ).

³⁷ *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ), 64-65 (Menzies J), 65 (Windeyer J), 67 (Owen J), 69-70 (Walsh J), 70 (Gibbs J); *Magaming v The Queen* (2013) 252 CLR 381, 396-397 [45]-[49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 414-415 [104]-[108] (Keane J).

³⁸ *A V Dicey, An Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed, 1965) 39-40; *British Railways Board v Pickin* [1974] AC 765, 782 (Lord Reid); *Lipohar v The Queen* (1999) 200 CLR 485, 509-510 [57] (Gaudron, Gummow and Hayne JJ).

not constrain, for example, the conferral of protective jurisdictions on tribunals or other executive bodies (the correlative principle that operates under the separation of powers).³⁹ Accordingly, acceptance of the Plaintiff's submission may incentivise the States and Territories to enact laws that would sit in tension with "the emergence of a conventional understanding that ... a power to constrain liberty by reference to what a person might do in the future, if it is to be conferred at all, is best conferred on a court."⁴⁰

26. The ambit of the institutional integrity doctrine was succinctly explained by Chief Justice Gleeson in *Forge* in the following terms:

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It follows from the terms of Ch III that State Supreme Courts must continue to answer the description of "courts". For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the Constitution.

To accept the Plaintiff's contention in the present case would extend the institutional integrity doctrine beyond its constitutional foundation in a manner that would tend to destabilise the doctrine itself.

Part V: TIME ESTIMATE

27. It is estimated that up to 15 minutes will be required for the presentation of South Australia's oral argument.

Dated: 6 August 2026

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³⁹ *Waterside Workers' Federation (Aust) v JW Alexander Ltd* (1918) 25 CLR 434, 441 (Griffith CJ); *Boilermakers* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

⁴⁰ *EGH19* (2026) 100 ALJR 400, 412 [26] (Gageler CJ and Gleeson J), quoting *Vella* (2019) 269 CLR 219, 260-261 [90] (Bell, Keane, Nettle and Edelman JJ), quoting *Thomas v Mowbray* (2007) 233 CLR 307, 508 [599] (Callinan J). See also, *Benbrika No 1* (2021) 272 CLR 68; *Garlett* (2022) 277 CLR 1. Justice McHugh recognised this possibility in *Fardon* (2004) 223 CLR 575, 600 [40] (McHugh J) ("no process of legal or logical reasoning leads to the conclusion that, because the federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.")

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DARWIN REGISTRY

No. D15/2025

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED

Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

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ANNEXURE

**PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE
ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
(INTERVENING)**

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	<i>Constitution</i>	Current	Ch III, ss 71, 73, 75, 76 and 77(iii)	In force at all relevant times	All relevant times
2.	<i>Bail Act 1982 (NT)</i>	Current	s 7A(2AB)	In force at all relevant times	All relevant times