



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

10 **NORTHERN TERRITORY OF AUSTRALIA**
Defendant

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

PART I: CERTIFICATION

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

20 **PARTS II & III: INTERVENTION**

2. The Attorney-General for the State of Tasmania (**Tasmania**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

PART IV: SUBMISSIONS

A. STANDING

3. Tasmania supports the Defendant's submissions on the question of standing (**DS [5]-[8]**). It further submits that the argument that the Plaintiff does not have standing is supported by the refusal of this Court in *Kuczborski v Queensland*¹ (**Kuczborski**) to entertain a challenge to the *Bail Act 1980* (Qld) by a person who had not been charged with a relevant offence.
- 30 4. In addition, despite the assertions made by the Plaintiff with regard to its clients,² it is not apparent that there is a relevant "matter", in the sense of a justiciable controversy

¹ (2014) 254 CLR 51.

² **SCB 40-41 [1]**.

about an existing legal right or legal obligation to be determined by the Court.³

B. SUMMARY OF ARGUMENT

5. The Plaintiff's reliance upon the *Lim*⁴ principle as a basis for analysing the constitutional validity of s 7A(2AB) of the ***Bail Act 1982*** (NT) is both unnecessary and contrary to authority. The validity of s 7A(2AB) can and should be determined by reference to the *Kable*⁵ principle. The *Lim* analysis is neither relevant nor of assistance given that: the provision does not authorise detention; remand in custody is not punitive; and, in any event, remand in custody pending trial is a recognised exception to the *Lim* principle. Section 7A(2AB) does not substantially impair the institutional integrity of the courts of the Northern Territory but involves those courts in a standard judicial process.

C. NATURE AND HISTORY OF BAIL

6. It may be accepted that the right to personal liberty is “the most elementary and important of all common law rights”.⁶ However, that liberty may be curtailed if a person is arrested and charged with an offence. The arrest will involve a deprivation of liberty.⁷ The power to arrest and charge a person with an offence and to hold that person in custody is essential to the functioning of the criminal justice system.⁸ Bail, which is said to be as old as the law of England itself,⁹ permits “an accused to be free during the criminal process and also to ensure that the accused will appear in court when required”.¹⁰ As Edelman J has remarked, the grant of bail “is an enhancement of the liberty” of a suspected offender.¹¹
7. Bail was originally granted by a surety who was personally responsible for the custody of the accused pending criminal proceedings by surrender of their own person or forfeit

³ *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at 536 [26], [29] (Kiefel CJ, Keane and Gordon JJ), 559 [79] (Edelman and Steward JJ); *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 278 CLR 512 at 527 [31]-[32] (Kiefel CJ, Gordon and Steward JJ), 539-540 [68] (Edelman J).

⁴ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***).
⁵ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***).

⁶ *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J).

⁷ *Donaldson v Broomby* (1982) 60 FLR 124; 5 A Crim R 160 (FCA), Deane J at 126; 161; *Webster v McIntosh* (1980), 49 FLR 317 at 322 (Brennan J, Deane and Kelly JJ agreeing).

⁸ *EGH19 v The Commonwealth of Australia* [2026] HCA 7; (2026) 100 ALJR 400 at 471 [318(1)] (Jago J).

⁹ J F Stephen, *History of the Criminal Law of England*, (1883), 233.

¹⁰ J B Bishop, *Criminal Procedure*, 2nd ed, Butterworths, Sydney, 1998, 200.

¹¹ *EGH19 v The Commonwealth of Australia* [2026] HCA 7; (2026) 100 ALJR 400 at 450 [208].

of property.¹² It was granted by sheriffs, whose role was later taken over by justices.¹³ In cases where bail had not been granted by justices, release from imprisonment or bail by a court was able to be obtained by a writ of habeas corpus¹⁴ or in the exercise of the inherent power of a superior court.¹⁵

8. Early legislation relating to bail was not necessarily an effort to restrict the State's power to detain a person before trial (**PS [15]**). The purpose of early legislation was to regulate the improper exercise of the power to grant bail, including where bail had been granted to persons who should not have been granted bail - and not granted to those who should.¹⁶ It also addressed failures to apply bail laws properly and dealt with demands for excessive amounts as surety for bail.¹⁷

9. In Australia, the laws of England, both common law and statute, were received in the colonies as applicable to the altered conditions.¹⁸ Further, s 24 of the *Australian Courts Act 1828* (Imp) applied legislation including bail laws in the colonies of New South Wales and Van Dieman's Land. The *Indictable Offences Act 1848* (Imp) was later adopted in New South Wales. Section 23 of that Act gave a Justice of the Peace the discretion to admit persons charged with any felony, or various other specified offences, to bail "upon his procuring and producing such Surety or Sureties as in the Opinion of such Justice will be sufficient to ensure the Appearance of such accused Person at the Time and Place when and where he is to be tried...". Persons charged with indictable misdemeanours, other than those already mentioned in the provision, were required to be admitted to bail. There was an exception for persons charged with treason, who could not be granted bail except by order of one of Her Majesty's Secretaries of State, or by the Queen's Bench at Westminster or a Judge thereof in vacation. Bail was conditional

¹² R P Roulston, "Principles of Bail" (Paper presented at the Seminar on Bail, Sydney Institute of Criminology, 14 November 1969) at 2.

¹³ J F Stephen, *History of the Criminal Law of England*, (1883) at 236.

¹⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562 at [26] (McHugh J); J F Stephen, *History of the Criminal Law of England*, (1883) at 243.

¹⁵ J F Stephen, *History of the Criminal Law of England*, (1883) at 243; *R v Spilsbury* [1898] 2 QB 615 at 620: "This Court has, independently of statute, by the common law, jurisdiction to admit to bail".

¹⁶ J F Stephen, *History of the Criminal Law of England*, (1883) at 234 quoting the recital to the *Statute of Westminster the First* (3 Edw 1, c 12) of 1275, sheriffs and others "have taken and kept in person persons detected of felony and incontinent have let out by replevin such as were not replevisable because they would gain of the one party and grieve the other."

¹⁷ J F Stephen, *History of the Criminal Law of England*, (1883) at 237 referring to the *Bill of Rights* (1 W & M, c 2) of 1688 which required depositions of witnesses to be taken and returned to the court whenever a person was bailed and "was intended primarily as a security against malpractices of the justices".

¹⁸ *R v Kidman* (1915) 20 CLR 425 at 435-436 (Griffith CJ); *Cooper v Stuart* (1889) 14 App. Cas. 286 at 291.

on the accused entering into a recognizance relating to their future required appearances. Later legislation applicable in New South Wales and Tasmania at the time the *Constitution* was being drafted made similar provision, though the decision to grant bail in cases of persons accused of treason was made by the Supreme Court.¹⁹

10. Section 120 of the *Constitution* provides that States “shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth”. The *Constitution* therefore plainly contemplates that persons accused of Commonwealth offences will be detained in prisons. There is no reason to consider that the situation is any different in relation to those accused of State or Territory offences. The detention of accused persons awaiting trial may therefore be said to be constitutionally permissible. Indeed, the High Court has repeatedly recognised the same.²⁰

Purpose of bail

11. The probability of the accused appearing at trial is generally accepted as the primary consideration in considering whether to grant bail, but it is not the sole or pre-eminent consideration in all circumstances.
12. The protection of the public or prosecution witnesses are also factors which have historically been considered in the exercise of the discretion to grant bail pending conviction. According to the *History of the Criminal Law of England*, persons who were not to be bailed because of the 1275 *Statute of Westminster* included “thieves openly defamed and known, and such as are appealed (accused) by approvers”.²¹ While probability of appearing was doubtless an aspect of refusing bail to such persons, it is reasonable to infer that refusing bail to well-known thieves was also to protect the public from further offending. After all, the refusal of bail to a person with a history of offending

¹⁹ *Indictable Offences Act 1848* (11 & 12 Vic ch 42) s 23; *The Magistrates Criminal Procedure Act 1855* (VDL) (19 Vic, 9) s 19, repealed by the *Justices Procedure Act 1919* (Tas) s 3.

²⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ); *Re Woolley*; *Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24-25 [58] (Gleeson CJ); *EGH19 v The Commonwealth of Australia* [2026] HCA 7; (2026) 100 ALJR 400 at 471 [318] (Jagot J).

²¹ J F Stephen, *History of the Criminal Law of England*, (1883) at 235.

on bail is consistent with the general purpose of the criminal law to protect the community, as recognised for instance in the context of sentencing.²²

13. The New South Wales Law Reform Commission described the denial of bail as a tool to address increasing crime notwithstanding the *Bill of Rights 1688* outlawing excessive bail and the *Habeas Corpus Act 1679* creating a right to bail in certain circumstances.²³ The protection of the public from the likelihood of offending on bail is referred to in a number of reported decisions as a consideration in whether to grant bail. For example:

- 10 (a) In *R v Watson* (1947) 64 WN (NSW) 100, it was said that “the interests of the community must equally be protected by proper detention and punishment of criminals, and this will not in my view be best served by freeing such persons on bail in serious cases, except in the presence of exceptional circumstances”.²⁴
- (b) In *R v Phillips* (1948) 32 Cr App R 47, when refusing an application for appeal against sentence for ten house-breaking and larceny offences, nine of which were committed while on bail, the English Court of Criminal Appeal said the “Court feels very strongly that the applicant ought not to have been released on bail.... Some crimes are not at all likely to be repeated if a prisoner is released on bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had”.²⁵
- 20 (c) In *R v Light* [1954] VicLawRp 25; [1954] VLR 152 at 158, Sholl J said that a relevant and important consideration in granting bail “is the question of the safety of the public and the security of its property”. His Honour also referred, at 156, to his earlier unreported decision in *R v Lumsden* in which he said that the “authorities show, I think, that the probability or reasonable probability 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”.

²² *Veen v The Queen [No 2]* (1988) 164 CLR 465.

²³ New South Wales Law Reform Commission, *Bail*, Report 133, New South Wales Government, April 2012 at 20-21 [3.6].

²⁴ *R v Watson* (1947) 64 WN (NSW) 100 at 102 (Herron J).

²⁵ *R v Phillips* (1948) 32 Cr App R 47 at 48.

- (d) In *R v Alexander* [1956] VR 451, Sholl J refused bail to a person charged with breaking and entering property and stealing because he had the “strongest misgivings” that the accused would commit a further similar offence if bail was granted.²⁶
- (e) In *R v Fisher* (1964) 14 Tas R 14 at [18], Crawford J considered the safety and security of the public as one of the factors which, he noted, was referred to by “many judges” as relevant to the discretion to grant bail. In that regard, he referred to the records of each accused, including records of offending while under a suspended sentence and the strong evidence relating to the matters for which they were accused.
- (f) More recently, in *Woods v DPP* [2014] VSC 1 at [33], Bell J wrote: “[w]hile the first consideration in bail applications is whether the accused will appear to answer the charges, whether he or she would commit further offences on bail, endanger the safety or welfare of the public or interfere with witnesses are mandatory statutory considerations (s 4(2)(d)). This too is the position at common law, as expounded in leading authorities such as *Light* and *R v Watson*”.

14. The Plaintiff’s apparent inference that the only permissible justification for a bail decision is the availability purpose (**PS [21]**) therefore oversimplifies the law relating to bail and ignores the fact that a likelihood of offending whilst on bail and protection of the public have been longstanding factors in the exercise of the discretion to grant bail.

D. KABLE

15. The Plaintiff asserts that s 7A(2AB) of the *Bail Act* substantially impairs the institutional integrity of several courts of the Northern Territory and is therefore inconsistent with Ch III of the Constitution.
16. It does so on the basis of an assertion that s 7A(2AB) authorises a court to detain a person in custody (**PS [29]**). However, that is not what s 7A(2AB) does. Rather than conferring a power to detain, it restricts the court’s ability to release an accused person on bail. Words ought not to be read into the provision so as to change the effect of the provision

²⁶ *R v Alexander* [1956] VR 451 at 456.

from a restriction upon a power to release a person to a separate authority to detain.²⁷ Although detention is the practical and legal outcome of a refusal to grant bail, the source of authority to detain is to be found elsewhere.

17. Despite the Plaintiff's foray into the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,²⁸ their assertion of invalidity is founded on, and should therefore be answered by reference to, the principle in *Kable v Director of Public Prosecutions (NSW)*.²⁹
18. The *Kable* principle has been expressed in the following terms in *Attorney-General (NT) v Emmerson*:³⁰

10 The principle for which *Kable* stands is that because 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.

19. The reference to "institutional integrity" has been explained by reference to maintaining the defining characteristics of a court.³¹ It is not possible to exhaustively define those characteristics, but an important element is the capacity to administer the common law system of adversarial trial as an independent and impartial tribunal.³² The power to
20 detain an accused person pending trial and the power to grant bail support that capacity in the sense that they are powers "ancillary to the process of adjudging and punishing criminal guilt".³³

20. It is also recognised that independence from the executive and legislature is "essential to the need to maintain the integrity of Ch III courts" in order to allow those courts to "be free to act impartially in accordance with judicial process".³⁴

²⁷ *Taylor v Owners — Strata Plan No 1 1564* (2014) 253 CLR 531 at 548 [38] (French CJ, Crennan and Bell JJ).

²⁸ (1992) 176 CLR 1.

²⁹ (1996) 189 CLR 51.

³⁰ 253 CLR 393 at 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

³¹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]; *Garlett v Western Australia* (2022) 277 CLR 1 (**Garlett**) at 43-44 [117] (Gageler J).

³² *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64].

³³ *Vella v Commissioner of Police (NSW)* 269 CLR 219 at 281 [157] (Gageler J).

³⁴ *Garlett v Western Australia* (2022) 277 CLR 1 at 28 [57] (Kiefel CJ, Keane and Steward JJ).

21. The legislation considered and found unconstitutional in *Kable* (which required the court to order the detention of a named individual) has been described as extraordinary³⁵ and not otherwise known to the law.³⁶ That legislation was very different to s 7A(2AB). Unlike the law found to be invalid in *Kable*, s 7A(2AB) is a law of general application which applies to all persons accused of the offences mentioned in s 7A(1). It also requires the court to evaluate whether it has the necessary “high degree of confidence” that the accused will not commit certain offences or otherwise endanger the safety of the community if granted bail. It is not a law which seeks to force a decision of the legislature or the executive upon the court and to thereby remove its ability to arrive at an independent decision. It does not operate to substantially impair the institutional integrity of the courts of the Northern Territory. It simply regulates existing processes for granting bail in certain limited circumstances, in the sense of requiring an additional and higher level of satisfaction prior to allowing the release of an accused on bail. Notably, s 7A(2AB) is only engaged once the court reaches a state of mind as to bail following the processes under s 24 or s 24A.

Legislative policy

22. There can be no doubt that the jurisdiction of a court to release an accused person who is detained pending trial can be altered or removed by legislation.
23. The history of bail shows that constraints on bail, both legislative and at common law, are not extraordinary. Limiting access to bail (including by reference to certain types of offences or circumstances) is a longstanding aspect of bail. For example, it had long been the case in England that a person could not be bailed if charged with treason or murder, or where they had confessed or the evidence against them was strong.³⁷
24. In *Chau v Director of Public Prosecutions*,³⁸ the New South Wales Court of Appeal rejected a constitutional challenge to s 8A of the *Bail Act 1978* (NSW) (a provision reversing the statutory presumption in favour of bail which otherwise applied) based on

³⁵ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 595 [33] (McHugh J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 (Toohey J).

³⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106 (Gaudron J).

³⁷ J F Stephen, *History of the Criminal Law of England*, (1883) at 234-235 referring to the *Statute of Westminster the First* (3 Edw 1, c 12) of 1275 which is said to have applied in England for more than 500 years.

³⁸ (1995) 37 NSWLR 639.

Chapter III. Gleeson CJ noted that there “is a long history of legislation affecting, and altering, the rights of persons to bail in various circumstances”,³⁹ and Kirby P indicated the provision was merely “an extension and adaptation of what was the previous common law position as judged to be necessary for the effective functioning of criminal justice in cases such as this”.⁴⁰ Similarly, s 7A(2AB) adapts the previous position for granting bail by making a grant of bail conditional upon a prediction about the risk of future offending and risk to community safety.

25. The exercise of a function or power by a court in compliance with statute which requires that it apply a high standard does not involve the court in implementing policy at the direction of or as a tool of the executive or legislature. As observed in *Kuczborski*:⁴¹

That the legislature's policies inform the laws which it passes does not mean that the court's enforcement of those laws is incompatible with its institutional integrity.

26. In *Garlett*, it was recognised that:⁴²

The general proposition for which *Kable* stands must 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. It is within this context that it can be appreciated that the vice of the *Community Protection Act* was that it enlisted the Supreme Court to give effect to a decision on the part of the executive government that Mr Kable should remain in detention.

27. It may not be unreasonable to view s 7A(2AB) as making it more difficult to obtain bail. No doubt, that is its purpose. If the Plaintiff means to attack s 7A(2AB) on the basis that it is thought to be harsh, laws with harsh outcomes do not, for that reason, engage the *Kable* principle. As the plurality in *Kuczborski* pointed out:⁴³

It may be accepted that the possible reach of these provisions is very wide, and even that their operation may be excessive and even harsh. But as was explained in *Magaming v The Queen*,⁴⁴ to demonstrate that a law may lead to

³⁹ At 644.

⁴⁰ At 658; referred to in *Nicholas v The Queen* (1998) 193 CLR 173 at 225 [124] (Gaudron J).

⁴¹ (2014) 254 CLR 51 at 117 [220] (Crennan, Kiefel, Gageler and Keane JJ).

⁴² (2022) 277 CLR 1 at 29 [60] (Kiefel CJ, Keane and Steward JJ).

⁴³ (2014) 254 CLR 51 at 116 [217] (Crennan, Kiefel, Gageler and Keane JJ).

⁴⁴ *Magaming v The Queen* (2013) 252 CLR 381 at 397-398 [50]-[52], 413-414 [103]-[108]. See also *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 437-438 [79]-[80].

harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity.

28. Along similar lines, the plurality in *Kuczborski* recognised that “it is not part of this Court’s functions to pass judgment on the political wisdom of the impugned laws”,⁴⁵ referring to Brennan CJ’s explanation in *Nicholas v The Queen*:⁴⁶

10 It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court’s opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests.

29. Giving effect to valid legislation does not compromise the integrity of courts.⁴⁷

Standard judicial process

30. A court engages in a standard judicial process in reaching a determination under s 7A(2AB). It is not subject to dictation by the executive or the legislature but forms its own view on the matter as to whether bail should be granted. The addition of a further criteria comprising the need for “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 does not constitutionally alter the substantive role of the court in determining whether a person is to be released on bail.
- 20 The court is not enlisted to do the bidding of the executive or the legislature.

31. Although it may be harder to satisfy the court that bail should be granted, that does not lead to constitutional invalidity. The bar is not set so high that it is impossible to achieve the required standard of satisfaction, nor is it set so high that there is no room left for a judicial assessment of risk. While s 7A(2AB) itself does not specify criteria to reach the “high degree of confidence”, the matters considered by a court will be informed by normal evidentiary requirements.

32. Decisions considering the phrase “high degree of confidence” in the context of NSW bail legislation illustrate the judicial approach taken to applying that phrase.⁴⁸ It has been

⁴⁵ (2014) 254 CLR 51 at 99 [146].

⁴⁶ (1998) 193 CLR 173 at 197 [37]; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23] (Gleeson CJ).

⁴⁷ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23] (Gleeson CJ); *Kuczborski v Queensland* (2014) 254 CLR 51 at 119-120 [231] (Crennan, Kiefel, Gageler and Keane JJ).

⁴⁸ *R v BH* [2024] NSWSC 1577; *R v RB* [2024] NSWSC 471; *R v TW* [2024] NSWSC 1505.

found that the assessment involves an evaluative judgment to reach a state of satisfaction regarded as a “high bar”, but not a state of certainty.⁴⁹ The circumstances of the accused may be taken into account, including support services which may be available to the accused.⁵⁰

33. Unlike the provision held invalid in *South Australia v Totani*⁵¹ which enlisted the court to give effect to the decision of the executive regarding the existence of a risk to public safety, s 7A(2AB) permits the court to form its own view following its own assessment of the risk that, if a person is released on bail, the person will not commit any relevant offences or otherwise endanger safety of the community. The fact that the court is permitted by s 7A(2AB) to form its own view in assessing that risk and in determining whether it has a “high degree of confidence” as to those matters, is “essential to its validity”.⁵²

34. Importantly, it is established that “assessments and predictions of risk to the community are not matters that are incapable of judicial evaluation”,⁵³ and that the criterion of risk “is capable of judicial application”.⁵⁴ It has also been observed that the “process of reaching a predictive conclusion about risk is not a novel one”,⁵⁵ and that “[c]ourts are often called on to make predictions about dangers to the public”.⁵⁶ In assessing whether it has a “high degree of confidence”, the court will presumably inform itself by taking into account the evidence or information which was available to it under s 24 which it considers to be “credible or trustworthy”, including hearsay evidence (s 24(2)).

35. It is also relevant to observe that bail can be imposed with conditions, including the provision of security, the wearing of monitoring devices and restrictions on movement or association.⁵⁷ The imposition of those sorts of conditions may, in some cases, enable the necessary “high degree of confidence” required by the provision to be reached.

⁴⁹ *R v BH* [2024] NSWSC 1577 at [14] (Yehia J); *R v JS* [2025] NSWSC 116 at [12] (Lonergan J).

⁵⁰ *R v BH* [2024] NSWSC 1577 at [35]-[37] (Yehia J); *R v TW* [2024] NSWSC 1505, [17] (Rothman J).
⁵¹ (2010) 242 CLR 1.

⁵² *Vella v Commissioner of Police (NSW)* 269 CLR 219 at 232 [14] (Kiefel CJ).

⁵³ *Garlett v Western Australia* (2022) 277 CLR 1 at 68 [185] (Gordon J).

⁵⁴ *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 87 [11] (Kiefel CJ, Bell, Keane and Steward JJ).

⁵⁵ *Vella v Commissioner of Police (NSW)* 269 CLR 219 at 251 [68] (Bell, Keane, Nettle and Edelman JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 657 [225] (Callinan and Heydon JJ).

⁵⁶ *Vella v Commissioner of Police (NSW)* 269 CLR 219 at 253 [74] (Bell, Keane, Nettle and Edelman JJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 96 [143].

⁵⁷ *Bail Act 1982 (NT)* s 27-28.

36. Further indicators that s 7A(2AB) provides for a process consistent with the institutional integrity of a court include that there is no limit on the number of applications for bail which may be made and considered (s 19), that there is a power of review under Part 6 and that the powers of the Supreme Court in connection with writs of habeas corpus are unaffected (s 43).

37. The Plaintiff suggests that the court “retains no discretion to grant bail where it is not satisfied of s 7A(2AB)” (PS [44]). However, the same argument could be said to apply in relation to numerous statutory restrictions upon granting bail unless “exceptional circumstances” are established (including, for example, under s 15AA of the *Crimes Act 1914* (Cth)). The suggestion does not form a basis for constitutional invalidity. If a court is not satisfied as required by s 7A(2AB), an obligation to refuse bail simply follows as a “stated statutory consequence”⁵⁸ and as a requirement of the law. As the plurality said in *Garlett*:⁵⁹

The circumstances that the Court is not invested with a residual discretion to decline to make a restriction order does not establish that it is acting upon the dictation of the executive government as to the manner of deciding the case or its outcome. While s 48(1) is couched in mandatory terms, the terms of s 48(2) and the definition of “high risk serious offender” in s 7(1) mean that the judicial evaluation upon which the Court’s determination depends is essential to the making of a restriction order.

38. Section 7A(2AB) involves an orthodox judicial process, which points to its validity.⁶⁰ It does not impair institutional integrity.

E. THE PRINCIPLE IN *LIM* IS NOT RELEVANT

39. The constitutional limitation identified in *Lim* has been described in the following terms:⁶¹

...that a Commonwealth law purporting to impose a detriment of a nature and severity which warrants prima facie characterisation as penal or punitive, 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

⁵⁸ *Garlett v Western Australia* (2022) 277 CLR 1 at 33-34 [74] (Kiefel CJ, Keane and Steward JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 431 [60].

⁵⁹ *Garlett v Western Australia* (2022) 277 CLR 1 at 33 [72] (Kiefel CJ, Keane and Steward JJ).

⁶⁰ *Garlett v Western Australia* (2022) 277 CLR 1 at 24 [41] (Kiefel CJ, Keane and Steward JJ).

⁶¹ *EGH19 v Commonwealth of Australia* [2026] HCA 7; (2026) 100 ALJR 400 at 410 [14] (Gageler CJ and Gleeson J).

law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.

40. However, the correct approach to assessing the validity of s 7A(2AB) is not by reference to the principle in *Lim*. That principle does not apply to State or Territory legislation but operates as a restriction on Commonwealth legislative power in consequence of the strict separation of powers at the Commonwealth level.⁶²

10 41. Given that the Plaintiff challenges the validity of s 7A(2AB) on the basis that it substantially impairs the institutional integrity of several courts of the Northern Territory, it is appropriate to consider the question of validity having regard to the *Kable* principle alone. Even to the extent to which the *Lim* principle might nevertheless “inform”⁶³ or “is not irrelevant to”⁶⁴ the *Kable* principle, it does not support a finding that the impugned provision substantially impairs the institutional integrity of the courts of the Northern Territory. It does not do so because, as discussed below, detention awaiting trial is not punitive and is nevertheless a recognised exception to *Lim*. The legislative imposition of a higher standard of satisfaction before granting bail does not alter that. It is therefore submitted that proceeding to consider the validity of s 7A(2AB) by reference to the *Lim* principle is unwarranted. However, in the event that the Court proceeds to consider the application of the *Lim* principle, the following submissions are made.

20 42. If bail is not granted by a court under s 6 of the *Bail Act*, the accused will continue to be held in custody due to powers to remand in custody in other legislation.⁶⁵

43. Custody of an accused awaiting trial has been identified as the most important of the qualifications to the limitation identified in *Lim*.⁶⁶

The most important is that which Blackstone himself identified in the above passage, namely, 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

⁶² *Garlett v Western Australia* (2022) 277 CLR 1 at 23 [40] (Kiefel CJ, Keane and Steward JJ), 90 [247]-[248] (Edleman J); 106-107 [293]-[296] (Gleeson J).

⁶³ *Garlett v Western Australia* (2022) 277 CLR 1 at 91 [248] (Edelman J); see also at 46 [122] (Gageler J) in reference to the *Boilermakers* restriction associated with *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁶⁴ *Garlett v Western Australia* (2022) 277 CLR 1 at 67 [184] (Gordon J).

⁶⁵ See for example, the *Local Court (Criminal Procedure) Act 1928* (NT) ss 59, 60, 65, 113; *Criminal Code Act 1983* (NT) s 334; *Youth Justice Act 2005* (NT), s 65.

⁶⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29.

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. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the "ancient common law" jurisdiction, "before and since the conquest", to order that a person committed to prison while awaiting trial be admitted to bail.

- 10 44. As the Defendant points out, this exception has been recognised on multiple occasions in this Court (**DS [12], fn 9**).⁶⁷ In the same passage, it is also acknowledged that committal to custody awaiting trial is not seen by the law "as punitive or as appertaining exclusively to judicial power".⁶⁸ In view of the history of relevant factors taken into account in determining whether to grant bail, the exception should not be understood as being limited to the single purpose of ensuring that an accused is available for trial. Refusal of bail for additional legitimate purposes is not contrary to the availability purpose; but might ultimately serve that purpose.
45. In light of the clear exception, no further justification of s 7A(2AB) is required under the *Lim* principle. However, if the Court takes a different view, Tasmania supports the submissions of the Defendant on that point (**DS [57]-[73]**).

Part V: ESTIMATE OF TIME

- 20 46. It is estimated that Tasmania will require no more than 10 minutes for the presentation of oral argument.

Dated 6 August 2026



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⁶⁷ For example: *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 95 [29] (Kiefel CJ, Bell, Keane and Steward JJ), 131 [134] (Gordon J), 160 [207] (Edelman J); *NAAJA v Northern Territory* (2015) 256 CLR 569 at 593 [37] (French CJ, Kiefel and Bell JJ), 611 [97] (Gageler J); *Garlett v Western Australia* (2022) 277 CLR 1 at 50 [134]-135] (Gageler J), 63 [175], 64 [177]-[178] (Gordon J); *EGH19 v Commonwealth of Australia* [2026] HCA 7; (2026) 100 ALJR 400 at 429 [107] (Gordon J).

⁶⁸ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29.

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

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

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

**ANNEXURE TO INERVENER'S SUBMISSIONS (ATTORNEY-GENERAL FOR
THE STATE OF TASMANIA)**

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
<i>Commonwealth</i>					
1.	The Constitution	Current	s 120, Ch III	Currently in force	N/A
2.	<i>Crimes Act 1914</i>		s 15 AA	Currently in force	N/A
<i>Northern Territory</i>					
3.	<i>Bail Act 1982</i>	Current	ss 3, 3B, 6, 7, 7A, 19, 24, 24A, 27, 27A, 27B, 28, 43, Part 6	Currently in force	N/A
<i>Tasmania</i>					
4.	<i>The Magistrates Court Criminal Procedure Act 1855</i>	As made	s 19	Illustrative purposes	N/A
<i>England</i>					
5.	<i>Australian Courts Act 1828</i>		s 24	Illustrative purposes	N/A

6.	<i>Indictable Offences Act 1848</i> (11& 12 Vic)	As made	s 23	Illustrative purposes	N/A
7.	<i>Statute of Westminster 1275</i> (3 Edw 1)	As made	c 12	Illustrative purposes	N/A