HIGH COURT OF AUSTRALIA

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Form 27C—Intervener's submissions D15/2025
Note: See rule 44.04.4.

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 OF VICTORIA (INTERVENING)

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney-General of Victoria (**Victoria**) intervenes under s 78A of the *Judiciary Act 1903* (Cth).

Part III: Issues and argument

A Overview

3. Victoria's submissions are limited to Question 3 of the Special Case.

4. In summary, Victoria makes the following submissions. *First*, although both have roots in Ch III of the *Constitution*, the limit on State and Territory legislative power first articulated in *Kable v Director of Public Prosecutions (NSW)*[1] is distinct from the limit on Commonwealth legislative power recognised in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[2] The question of whether a State or Territory[3] law conferring (or regulating) a power to authorise detention in custody other than as punishment for criminal offending is invalid by reason of Ch III is to be determined in accordance with the *Kable* principle, and not by direct application of the *Lim* principle. Section 7A(2AB) of the *Bail Act 1982* (NT) will therefore only be invalid if it substantially impairs the institutional integrity of the relevant Territory courts so as to be incompatible with, or repugnant to, their role as repositories of federal jurisdiction.

5. *Secondly,* a primary consideration in the application of the *Kable* doctrine is the maintenance of the independence and impartiality of State and Territory courts. Even in cases concerning *Kable* challenges to State or Territory legislation conferring functions on courts in connection with the detention of an individual, or restrictions on individual liberty falling short of detention, this Court's determination of the validity of the

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1 (1996) 189 CLR 51.

2 (1992) 176 CLR 1.

3 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [27], [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), quoting with approval *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [81] (Gaudron J).

impugned legislation has focussed on its effect on the independence or impartiality of the relevant courts.

6. *Thirdly*, s 7A(2AB) does not confer a power or function on Territory courts that impairs their institutional integrity. The subsection restricts the circumstances in which a person charged with any of a range of offences may obtain a grant of bail, but it does not alter the essential nature of the function or power being exercised by the court — being to determine whether or not to grant bail — or its purpose. Neither the range of offences to which it applies, the high threshold imposed nor the manner in which the courts may determine whether the threshold is met support a conclusion that s 7A(2AB) substantially impairs the independence and impartiality of Territory courts.

7. *Fourthly*, even if the *Lim* principle as adapted in the recent jurisprudence of this Court applies (directly or indirectly) to the question of the validity of s 7A(2AB) of the *Bail Act*, the provision is valid. Section 7A(2AB) does not engage the *Lim* principle because an exercise of power to grant or refuse bail is properly characterised as an incident of the exclusively judicial power to adjudge and punish criminal guilt. Alternatively, even if the principle is engaged, s 7A(2AB) is reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose of protecting the community from the harm that may eventuate if a person charged with an offence is released on bail.

B The nature and ambit of the limit imposed on State and Territory legislative power by Ch III of the *Constitution*

B.1 *The* Kable *doctrine is distinct from the* Lim *principle*

8. *Kable* and the decisions that have followed it establish that a State or Territory legislature cannot confer upon a State or Territory court a function or power which substantially impairs its institutional integrity, and which is therefore repugnant to or incompatible with its role under Ch III of the *Constitution* as a repository of federal jurisdiction and its exercise of the judicial power of the Commonwealth.[4]

[4] See, eg, *Kable* (1996) 189 CLR 51 at 96 (Toohey J), 103 (Gaudron J), 116-119 (McHugh J), 127-128 (Gummow J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [15] (Gleeson CJ), [101] (Gummow J), [141] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at [69] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ); *Garlett v Western Australia* (2022) 277 CLR 1 at [7] (Kiefel CJ, Keane and Steward JJ).

9. The *Kable* principle is derived from Ch III, but is distinct from the limits derived from Ch III on the legislative power of the Commonwealth Parliament. In particular, as has been repeatedly acknowledged by members of this Court, the *Kable* principle is distinct from the limit on Commonwealth legislative power discussed in *Lim*.[5] The latter principle is derived from, and designed to preserve, the strict separation of powers at the federal level and the constitutional values protected by that separation. The former is derived from the constitutional recognition of State and Territory courts as part of the integrated Australian judicial system and is designed to preserve the essential character of, and public confidence in, those courts so that they are, and are seen to be, institutions suitable for the investiture and exercise of federal judicial power.

10. Indeed, it is the "fundamental" or "basic premise"[6] of the *Kable* doctrine that "State courts can be given tasks that the High Court (and federal courts created by the Parliament) cannot".[7] As McHugh J observed in *Fardon v Attorney-General (Qld)*, "State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law".[8]

11. The consequence is that the question of whether a State or Territory law infringes the *Kable* principle is to be determined by asking whether the law substantially impairs the institutional integrity of the relevant courts so as to be incompatible with, or repugnant to, their role as repositories of federal jurisdiction, and not by asking the "*Lim* questions" of whether the law is prima facie punitive and, if so, whether it is reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose: cf **PS [11], [14], [30]-[44]**.

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5 See, eg, *Kable* (1996) 189 CLR 51 at 103-104 (Gaudron J), 109 (McHugh J), 137, 142 (Gummow J); *Fardon* (2004) 223 CLR 575 at [37] (McHugh J), [86] (Gummow J); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [137] (Gordon J); *Garlett* (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ), [184] (Gordon J); *EGH19 v Commonwealth* (2026) 100 ALJR 400 at [289] (Jagot J).

6 *Fardon* (2004) 223 CLR 575 at [86] (Gummow J); *Garlett* (2022) 277 CLR 1 at [247] (Edelman J).

7 *Benbrika* (2021) 272 CLR 68 at [159] (Gordon J).

8 (2004) 223 CLR 575 at [42], see also at [41].

12. As the defendant acknowledges (**DS [17]**), the principle stated in *Lim*, and in the Court's recent jurisprudence applying that principle to federal laws authorising interferences with liberty other than as part of the adjudgment and punishment of criminal guilt,[9] may *inform* the determination of whether some power or function conferred on a State or Territory court is properly characterised as incompatible with the institutional integrity of that court so as to be beyond the power of the State or Territory legislature.[10] But the principles remain fundamentally distinct.[11] Indeed, it has been said that it would be a "'serious constitutional mistake' to think that either *Kable* or the *Constitution* assimilates State courts or their judges and officers with federal courts or their judges and officers".[12]

13. Accordingly, even if it is possible to conclude that a State or Territory law would have contravened the *Lim* principle had it been enacted by the Commonwealth Parliament, it does not follow that it necessarily contravenes the *Kable* principle. Moreover, to adopt a process of reasoning which first asks whether a State or Territory law would have contravened the *Lim* principle and, if so, then turns to consider the *Kable* principle begs the question of *why* the law might also contravene the *Kable* principle. That is, it is still necessary to articulate why the impugned law would substantially impair the State or Territory courts' institutional integrity, which may involve not only questions about the nature of the function or power conferred and the manner of its exercise, but also a question of *degree*. As this Court has emphasised, in order to contravene the *Kable* principle, "the repugnancy must usually be in a 'fundamental degree'".[13] Only "extreme legislation … will substantially impair the integrity of a State court".[14]

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9 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; *EGH19* (2026) 100 ALJR 400.

10 See, eg, *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [147] (Gordon J); *Garlett* (2022) 277 CLR 1 at [184] (Gordon J).

11 See fn 5 above.

12 *Garlett* (2022) 277 CLR 1 at [301] (Gleeson J), quoting *Fardon* (2004) 223 CLR 575 at [36] (McHugh J).

13 *Garlett* (2022) 277 CLR 1 at [242] (Edelman J), quoting *Kable* (1996) 189 CLR 51 at 132 (Gummow J).

14 *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [256] (Kirby J): "the engagement of the *Kable* principle is clearly reserved to attempts by legislation to impose upon courts functions that are seriously repugnant to, or incompatible with, the institutional independence and integrity of such courts".

B.2 ***The independence and impartiality of State and Territory courts***

14. The notions of impairment of institutional integrity and repugnancy are "not readily susceptible of definition in terms which will dictate future outcomes".[15] However, the authorities demonstrate that a primary consideration when assessing the validity of a law against the *Kable* doctrine is whether the law substantially undermines or impairs the character of the relevant State or Territory courts as independent and impartial tribunals.[16] The risk of a State or Territory law being inconsistent with the *Kable* principle is therefore particularly significant where the law impairs the reality or appearance of the decisional independence of the court.[17]

15. That is not to deny that the substantive nature, or content, of the function or power conferred on the court may also be relevant to the analysis.[18] But even in cases concerning *Kable* challenges to State or Territory legislation conferring functions on courts in connection with the detention in custody of an individual, or restrictions on individual liberty falling short of detention, this Court's determination of the validity of the impugned legislation has focussed on its effect on the independence or impartiality of the relevant courts.

16. In *Kable* itself, the Court held that an *ad hominem* law which purported to authorise the Supreme Court of New South Wales to make a preventive detention order against Mr Kable was invalid because it impaired the Supreme Court's institutional integrity. Essential to that holding was that by requiring the Supreme Court to make a preventive detention order by a process that substantially departed from ordinary judicial processes, the legislation undermined the appearance of the judiciary's independence from the legislature and the executive.[19] As McHugh J put it: "[The impugned law] makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison [Mr Kable] by a process that is far removed from the judicial process that is

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15 *Pompano* (2013) 252 CLR 38 at [124] (Hayne, Crennan, Kiefel and Bell JJ); *Garlett* (2022) 277 CLR 1 at [242] (Edelman J).

16 *Totani* (2010) 242 CLR 1 at [69] (French CJ), citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [66] (Gummow, Hayne and Crennan JJ) and *Ebner* (2000) 205 CLR 337 at [7]-[8] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Garlett* (2022) 277 CLR 1 at [182]-[184] (Gordon J), [295]-[296] (Gleeson J). See also, eg, *Bradley* (2004) 218 CLR 146 at [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

17 *Totani* (2010) 242 CLR 1 at [69] (French CJ).

18 See, eg, *Garlett* (2022) 277 CLR 1 at [116] (Gageler J), [245]-[246] (Edelman J).

19 *Kable* (1996) 189 CLR 51 at 98 (Toohey J), 107-108 (Gaudron J), 119-124 (McHugh J), 133 (Gummow J). See also *Garlett* (2022) 277 CLR 1 at [60] (Kiefel CJ, Keane and Steward JJ), cf at [246] (Edelman J).

ordinarily invoked when a court is asked to imprison a person".[20] As his Honour later said in *Fardon*, the legislation declared invalid in *Kable* was "extraordinary".[21]

17. Although, as two Justices of this Court have stated, the reasoning in *Kable* "reflected" the canonical statement of Brennan, Deane and Dawson JJ in *Lim*[22] 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",[23] the two subsequent *Kable* challenges to State laws authorising preventive detention regimes,[24] each of which was dismissed, did not turn on an analysis of whether the law was "reasonably capable of being seen as necessary for a legitimate and non-punitive purpose": cf **PS [11]-[14]**. Rather, the majority reasoning in each case focussed on whether the impugned laws required the courts to adjudicate on the issue before them in a manner that departed substantially from ordinary judicial processes which, in turn, would create a risk of undermining the reality and appearance of their independence from the other arms of government.

(1) In *Fardon*, the validity of Queensland legislation which provided for the continuing post-sentence detention of prisoners convicted of serious sexual offences was upheld by a majority of the Court. Gleeson CJ, as part of the majority, rejected the proposition advanced by the appellant that the making of an order for preventive detention inherently compromised the institutional integrity of a court.[25] Callinan and Heydon JJ stated that "[s]o long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a

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20 *Kable* (1996) 189 CLR 51 at 122 (McHugh J), see also at 107 (Gaudron J).

21 *Fardon* (2004) 223 CLR 575 at [33] (McHugh J).

22 (1992) 175 CLR 1 at 27.

23 *Fardon* (2004) 223 CLR 575 at [77] (Gummow J); *Garlett* (2022) 277 CLR 1 at [137] (Gageler J).

24 *Fardon* (2004) 223 CLR 575; *Garlett* (2022) 277 CLR 1. This Court also upheld the validity of a preventive control order scheme in *Vella* (2019) 269 CLR 219. There was dispute during oral argument in *Vella* about whether the regime properly construed would permit an order for custodial detention to be made, but it was unnecessary for the Court to decide this issue given no such order was sought against any of the plaintiffs: see at [53].

25 *Fardon* (2004) 223 CLR 575 at [20].

court are not compromised, then the legislation in question will not infringe Ch III of the *Constitution*".[26]

(2) The reasoning in *Fardon* was later explained as being that "the adjudicative process required of the State Supreme Court in that case supported the maintenance of the institutional integrity of the Court and the adjudicative process required could be performed 'independently of any instruction, advice or wish of the legislative or executive branches of the government'".[27]

(3) In *Garlett v Western Australia*, a majority of the Court held that the conferral of a power on the Supreme Court of Western Australia to make a continuing detention order in respect of "high risk serious offenders" was not incompatible with its role as a repository of the judicial power of the Commonwealth. The Court held that in making such an order, the Supreme Court was not "acting upon the dictation of the executive government as to the manner of deciding the case or its outcome".[28] The impugned legislation preserved the Supreme Court's evaluative function, which was required to be carried out in accordance with processes characteristic of the exercise of judicial power, and did not therefore require it "to carry out an unjudicial task".[29]

18. Additionally, in the only two cases in which State laws authorising courts to make preventive orders curtailing liberty falling short of detention (control orders) have been held to be invalid on the basis of the *Kable* doctrine (*South Australia v Totani*[30] and *Wainohu v New South Wales*[31]), "the flaw in the legislation [in each case] lay in the co-opting of the courts by the executive to implement decisions of the executive".[32]

19. In *Vella v Commissioner of Police (NSW)*, in the course of dismissing a challenge to the validity of a control order scheme under New South Wales legislation, Bell, Keane,

26 *Fardon* (2004) 223 CLR 575 at [219].

27 *Garlett* (2022) 277 CLR 1 at [65] (Kiefel CJ, Keane and Steward JJ), quoting *Emmerson* (2014) 253 CLR 393 at [43] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

28 *Garlett* (2022) 277 CLR 1 at [72], see also at [107] (Kiefel CJ, Keane and Steward JJ), [261] (Edelman J), [291] (Gleeson J).

29 *Garlett* (2022) 277 CLR 1 at [68], [73], [84], [97] (Kiefel CJ, Keane and Steward JJ), [261] (Edelman J).

30 (2010) 242 CLR 1.

31 (2011) 243 CLR 181.

32 *Garlett* (2022) 277 CLR 1 at [95] (Kiefel CJ, Keane and Steward JJ). A challenge to State legislation based on the *Kable* doctrine also succeeded in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, which concerned asset-freezing legislation.

Nettle and Edelman JJ observed that the plaintiffs' objections to the impugned legislation could be reduced to "an objection to the legislative policy involving a regime of preventive orders that can deprive individuals of liberty even in circumstances where they have not committed any offence in the past and might not be expected to do so in the future". Yet, their Honours stated, quoting Gleeson CJ in *Fardon*, "nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy".[33]

C The validity of s 7A(2AB) of the *Bail Act*

20. The plaintiff has expressed its challenge to the validity of s 7A(2AB) of the *Bail Act* only in terms of the principle expounded in *Lim* and in recent cases adapting and applying that principle to Commonwealth laws authorising detention or otherwise curtailing liberty: **PS [28]-[44]**; and see **DS [10], [17]**. These submissions first address why, in Victoria's submission, s 7A(2AB) does not infringe the *Kable* principle (in section C.1 below) and then turn to address, to the extent it is necessary or helpful to do so, why the subsection does not infringe the *Lim* principle (in section C.2 below).

C.1 *Section 7A(2AB) is not invalid on the basis of the* Kable *principle*

21. Victoria adopts the summary of the key features and operation of s 7A(2AB) of the *Bail Act*, including within the broader legislative scheme, set out in **DS [39]-[47]**.

22. Contrary to **PS [29]**, the starting point for assessing the validity of the provision is not to assume that s 7A(2AB) "is prima facie punitive by 'default'" because it authorises detention in custody other than as punishment for criminal guilt. Rather, the validity of s 7A(2AB) is to be assessed in accordance with the principles described in *Kable* and the subsequent cases discussed above (in section B). When that assessment is undertaken, it is apparent that there is nothing about the role given to courts applying s 7A(2AB) within the scheme of the *Bail Act* that would lead the Court to conclude that it is repugnant to, or inconsistent with, the independence and impartiality of Territory courts.

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33 *Vella* (2019) 269 CLR 219 at [24], quoting *Fardon* (2004) 223 CLR 575 at [23].

Section 7A(2AB) does not alter the nature or purpose of the court's function of granting bail

23. *First*, s 7A(2AB) does not confer a novel power of a kind considered in *Kable* or any of the subsequent preventive detention cases. Whether s 7A(2AB) is seen (as the plaintiff contends) as conferring a new power on the Northern Territory courts to remand an accused person in custody in the circumstances set out in the subsection or (as the defendant contends) as regulating a power to grant or refuse bail derived from elsewhere in the legislative scheme, the function or power being exercised by those courts remains the same — to determine whether an accused person should or should not be remanded in custody pending trial. That is a power which has been exercised by courts for centuries, and is entirely consistent with the institutional integrity of the Territory courts and their constitutional position as part of the integrated Australian judicial system.

24. A provision, such as s 7A(2AB), which makes it more difficult for an accused person charged with certain offences to obtain a grant of bail does not alter the fundamental nature of that function or power as being one to grant or refuse bail. That is particularly so when s 7A(2AB) is viewed in light of the fact that "[t]here is no common law right in a person who has been arrested and charged with a serious crime to be at liberty or on bail pending the resolution of the charge"[34] and in the context described in **DS [20]-[31]** in which bail has, historically, been unavailable in respect of certain offences.

25. The power to remand an accused person in custody pending trial is properly characterised as incidental to the judicial power to adjudge and punish criminal guilt. "The point at which an arrested person is brought before a justice upon a charge is the point at which the machinery of the law leading to trial is put into operation."[35] The accused person is not being detained for the purpose of punishment; rather, their detention is protective of, and incidental to, the exercise of judicial power to determine criminal guilt and impose punishment for an offence.[36] "It is no part of the purpose of a bail application to punish

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34 *Chau v Director of Public Prosecutions* (1995) 37 NSWLR 639 at 646 (Gleeson CJ); *R v Abuelheish* (2025) 396 FLR 73 at [23] (Reeves J).

35 *Williams v The Queen* (1986) 161 CLR 278 at 306 (Wilson and Dawson JJ).

36 *Vella* (2019) 269 CLR 219 at [157] (Gageler J), citing *R v Davison* (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J); *EGH19* (2026) 100 ALJR 400 at [107] (Gordon J), [318(1)] (Jagot J). See also McDonald, "Involuntary Detention and the Separation of Judicial Power" (2007) 35 *Federal Law Review* 25 at 72.

an accused person … Although the effect of the refusal [of bail] is a loss of liberty, that is not its purpose and object".[37]

26. This is so whether the law conferring the power to refuse bail pursues solely what the plaintiff terms the "availability purpose" or pursues some other purpose, or combination of purposes, which are properly characterised as protective: cf **PS [21]**. In relation to the purpose of s 7A(2AB), Victoria adopts the defendant's submissions at **DS [57]-[60]**, which draw a distinction between a specific statutory provision regulating the *grounds* on which bail may be granted or withheld and the ultimate or underlying purpose for which a person charged with an offence is being lawfully detained, which is to make them available to be dealt with by the courts. Further, as the defendant observes, if there is a substantial likelihood of a person committing an offence or endangering the community while on bail, that reduces the confidence one may have that they would answer their bail undertaking and appear at trial: **DS [63]**.

27. Even if s 7A(2AB) is to be construed as pursuing a purpose of protecting the community from harm, whether as its sole purpose or in combination with the "availability purpose", preventing the commission of offences by an accused person while they await trial has long been recognised as necessary to protect and promote the proper functioning of the criminal justice system. As Lamer CJ (writing for the majority in the Supreme Court of Canada) stated in *R v Morales*:[38]

> [T]he bail system … does not function properly if individuals commit crimes while on bail. One objective of the entire system of criminal justice is to stop criminal behaviour. The bail system releases individuals who have been accused but not convicted of criminal conduct, but in order to achieve the objective of stopping criminal behaviour, such release must be on condition that the accused will not engage in criminal activity pending trial … [I]f there is a substantial likelihood that the accused will engage in criminal activity pending trial, it furthers the objectives of the bail system to deny bail.

28. That reasoning applies with equal force to a law, such as s 7A(2AB), which deems community safety to be the "threshold" or "gateway" consideration (see **DS [14], [76]**)

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37 *Director of Public Prosecutions v Serratore* (1995) 38 NSWLR 137 at 147 (Kirby P).

38 [1992] 3 SCR 711 at 738 (Lamer CJ, La Forest, Sopinka, McLachlin and Iacobucci JJ agreeing); see also at 739, observing that "[t]he bail system has always made an effort to assess the likelihood of future dangerousness". See also *R v Pearson* [1992] 3 SCR 665; and *R v Hall* [2002] 3 SCR 309, where the Supreme Court held that a provision permitting the denial of bail "on any other just cause being shown" was unconstitutional, but that a law permitting the denial of bail "where necessary to maintain confidence in the administration of justice" was valid. The Court observed that public confidence is essential to the proper functioning of the bail system and the justice system as a whole: see at 327 (McLachlin CJ, L'Heureux-Dubé, Gonthier, Bastarache and Binnie JJ agreeing).

in an application for bail by a specific cohort of alleged offenders, who have been assessed by the Northern Territory Legislative Assembly as posing a specific and heightened risk of offending while on bail.[39] A power to authorise pre-trial detention in those circumstances remains incidental to the adjudgment and punishment of criminal guilt because it protects and enhances the proper functioning of the Northern Territory criminal justice system: cf **PS [21], [35]-[38]**. As Jagot J stated in *EGH19 v Commonwealth*, the power to hold a person charged with a criminal offence in custody is "essential to the functioning of the criminal justice system", "including" for the purposes of ensuring the person can be brought before the courts for trial[40] — but this circumstance is not *exhaustive* of the circumstances in which pre-trial detention may be necessary for the proper functioning of the criminal justice system, as her Honour implicitly recognised.

The operative features of s 7A(2AB) do not undermine the courts' independence

29. *Secondly*, s 7A(2AB) does not "enlist" the Territory courts to act as an "instrument" of the executive or legislature and therefore does not undermine either the reality or appearance of the courts' independence from those branches of government.[41] The provision is not a "device to keep people in jail upon mere accusation": cf **PS [43]**.[42] The Territory courts are not required to refuse bail merely because an accused person has been charged with an offence falling within the purview of s 7A(2AB).[43] Rather, the provision preserves a court's ability to engage in an evaluative assessment of the likelihood of the occurrence of one of the matters in para (a) or (b) of s 7A(2AB), based on the evidence before it.

30. The fact that the provision requires a court to be satisfied, to a high degree of confidence, of a negative state of affairs — that an accused person *will not* commit a prescribed or serious violence offence while on bail or otherwise endanger the safety of the community — does not undermine the evaluative nature of the court's assessment: cf **PS [41]**. As the defendant submits at **DS [17]**, s 7A(2AB) enacts a standard capable of judicial

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39 See Part C.2 below.

40 *EGH19* (2026) 100 ALJR 400 at [318(1)].

41 Compare *Kable* (1996) 189 CLR 51; *Totani* (2010) 242 CLR 1.

42 Citing *Stack v Boyle* 342 US 1 (1951) at 8-9 (Jackson J).

43 See *Garlett* (2022) 277 CLR 1 at [73] (Kiefel CJ, Keane and Steward JJ); compare *Totani* (2010) 242 CLR 1.

application. Although it imposes a high bar as to the state of satisfaction that a court must reach before it can grant bail, a "high degree of confidence" does not require a state of certainty.[44] It invites the court to engage in a probabilistic assessment of the likelihood of a future occurrence based on the evidence before it.[45] Courts have granted bail when engaging in an assessment of risk pursuant to provisions with a similar operation to s 7A(2AB).[46]

31. *Thirdly*, and relatedly, s 7A(2AB) is addressed to the substantive criteria to be applied to the assessment of an application for bail by a person charged with a relevant offence. It does not affect the manner in which the courts are to undertake that assessment. The ordinary rules of judicial fact-finding apply and the court in making a decision on bail is to be satisfied to the civil standard of proof as to any relevant matter.[47] The process by which the court is to determine whether bail must be refused under s 7A(2AB) is therefore a process characteristic of the exercise of judicial power.

32. Although the assessment required by s 7A(2AB) is to be undertaken "in isolation from" the matters set out in ss 24 and 24A, this does not mean that the evidence relevant to that assessment must be limited to the mere fact that a person has been charged with an offence enlivening the application of the provision. The matters in ss 24 and 24A are not *excluded* from a court's consideration when applying s 7A(2AB); rather, the words "in isolation from" are intended to reinforce that the test in s 7A(2AB) should apply as a discrete and additional test to that found in s 7A(2). The court must inevitably have regard to a range of factual matters, some of which are likely to substantially overlap with the criteria appearing in ss 24 and 24A, in order to assess the likelihood that a person will not commit a prescribed offence or a serious violence offence or otherwise endanger the safety of the community if released on bail: cf **PS [40]**. The result is that a court applying s 7A(2AB) retains a substantial degree of evaluative judgment;[48] s 7A(2AB) does not simply "[give] effect to the outcome sought" by the legislature or the executive.[49]

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44 *R v BH* [2024] NSWSC 1577 at [13]-[14] (Yehia J); *RB v The King (No 2)* [2024] NSWSC 845 at [69(10)] (Walton J).

45 *BH* [2024] NSWSC 1577 at [13] (Yehia J).

46 See, eg, *Re Altaee* [2025] VSC 720 (granting bail pursuant to s 4F of the *Bail Act 1977* (Vic)).

47 *Bail Act*, s 46.

48 Compare *Garlett* (2022) 277 CLR 1 at [97] (Kiefel CJ, Keane and Steward JJ).

49 Compare *Totani* (2020) 242 CLR 1 at [470] (Kiefel J).

33. *Fourthly,* the range of offences which may engage s 7A(2AB) does not undermine this analysis. That a power to authorise preventive curtailment of liberty is enlivened by a wide range of offending does not, of itself, impair the institutional integrity of a court empowered to make such an order.[50] Section 7A(2AB) reflects an assessment by the Northern Territory legislature that the cohort of alleged offenders captured by the provision may pose a heightened risk of endangering the community if released on bail, whether by reason of the nature of the offences with which they have been charged or by reason of matters specific to the alleged offender (such as recidivism risk in light of prior offending or alleged offending). As the defendant submits at **DS [69]**, it is a matter for the Territory legislature to identify those offences for which heightened requirements must be established for granting bail. Even in respect of "prescribed offences", which may be prescribed by regulation (s 3B), s 7A(2AB) only applies to such offences where the person charged is either on bail in relation to another charge for a "prescribed offence" or "serious offence" (s 7A(1)(de)) or has been convicted of two or more such offences in the previous two years (s 7A(1)(dea)). In addition, even in respect of the range of offences to which s 7A(2AB) applies, there is no limit on the number of bail applications that may be made by a person accused of an offence[51] (see also **DS [40], [42]**) and the Supreme Court retains its power to issue a writ of *habeas corpus*.[52]

34. For these reasons, the power conferred by s 7A(2AB) is not repugnant to or inconsistent with the institutional integrity of the Territory courts and does not contravene the *Kable* principle. The provision is valid.

C.2 *Section 7A(2AB) is not invalid on the basis of the* **Lim** *principle*

35. To the extent that it is necessary or helpful to consider the application of the *Lim* principle, Victoria further submits that, had s 7A(2AB) been enacted by the Commonwealth Parliament, it would not have been invalid by reason of that principle.

36. The plaintiff contends that s 7A(2AB) is punitive (**PS [30]-[34]**); that, even if it has a non-punitive purpose, it is not a constitutionally legitimate purpose (**PS [35]-[38]**); and, finally, that s 7A(2AB) is not reasonably capable of being seen as necessary for any

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50 See, eg, *Vella* (2019) 269 CLR 219; *Garlett* (2022) 277 CLR 1.

51 *Bail Act*, s 19(1).

52 *Bail Act*, s 43.

non-punitive purpose it does pursue (**PS [39]-[44]**). Each of those propositions should be rejected.

The *Lim* principle is not engaged

37. For the reasons given above, the grant or refusal of bail in accordance with s 7A(2AB) is incidental to the judicial power to adjudge and punish criminal guilt. Where an exercise of power is necessary to enable vindication of the exclusively judicial power to adjudge and punish criminal guilt (ie, is incidental to that power), it will not be punitive.[53] In those circumstances, the *Lim* principle is not engaged, because the power is "not seen by the law … as appertaining exclusively to judicial power".[54] Alternatively, it can be concluded that the *Lim* principle is not contravened without needing to consider whether the law is reasonably appropriate and adapted to the pursuit of a legitimate and non-punitive purpose, because the power is not "seen by the law as punitive", and is a well established "exception" to the paradigm case discussed in *Lim*.[55]

Protection of the community is a non-punitive and constitutionally legitimate purpose of pre-trial detention

38. Alternatively, even if the *Lim* principle is engaged, it is not infringed by s 7A(2AB). The provision is only engaged on an application for bail by a person accused of a relevant offence. The plaintiff's argument must be that the protective purpose of the subsection untethers the court's traditional function from the criminal process such that, in those cases, it can no longer be regarded as incidental to that process.

39. However, both the common law in this jurisdiction, and the constitutional and quasi-constitutional jurisprudence of comparable jurisdictions, support the conclusion that the protection of the community from the risk that an accused person may offend

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

54 See, eg, *Vella* (2019) 269 CLR 219 at [157] (Gageler J), quoting *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ); *EGH19* (2026) 100 ALJR 400 at [107] (Gordon J).

55 See, eg, *Fardon* (2004) 223 CLR 575 at [80] (Gummow J); *Benbrika* (2021) 272 CLR 68 at [18] (Kiefel CJ, Bell, Keane and Steward JJ), [219] (Edelman J); *Garlett* (2022) 277 CLR 1 at [178] (Gordon J); *EGH19* (2026) 100 ALJR 400 at [318(1)] (Jagot J).

while released on bail is a non-punitive and constitutionally legitimate purpose of pre-trial detention: **DS [57]-[63];** cf **PS [15]-[21], [30]-[38]**.[56]

40. "[A]s expounded in leading authorities"[57] in this jurisdiction, the common law power to remand a person in custody pending trial may be exercised for the purpose of protecting the community.[58] Though these authorities acknowledge that a "primary" or "fundamental" purpose of detention pending trial is to ensure an accused's attendance at court for trial, they establish the legitimacy of *other justifying grounds* on which a person may be detained pending trial, including the risk that a person may offend while on pre-trial release.

41. Even putting aside the common law position with respect to pre-trial detention, insofar as s 7A(2AB) is properly characterised as a "preventive order", such orders have long antecedents, "including, as early as the 14th century, in binding-over orders, by which justices of the peace and judges could bind over a person without proof of any offence, requiring payment of a sum of money as a pledge, if there were sufficient apprehension that the person's activities could breach the peace".[59] As has been observed, "[t]his species of 'preventative justice' to maintain order and preserve the public peace was part of the legal inheritance of the Australian colonies".[60]

42. Though not a direct analogy, these historical antecedents, together with the decisions of this Court upholding the validity of preventive detention regimes, militate strongly against the plaintiff's submission that laws such as s 7A(2AB) pursue a punitive and illegitimate purpose *simply* because they authorise pre-trial detention for the purpose of protecting the community against the risk that an accused person may offend if released on bail.

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56 "As with other questions pertaining to judicial power, historical practices and classifications are informative. And as with any constitutional question, looking to how comparable laws have in practice been seen by courts discharging comparable constitutional or quasi-constitutional responsibilities in comparable jurisdictions can be instructive": *Jones v Commonwealth* (2023) 280 CLR 62 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

57 *Woods v Director of Public Prosecutions* (2014) 238 A Crim R 84 at [33] (Bell J).

58 See *R v Watson* (1947) 64 WN (NSW) 100 at 100-102 (Herron J); *R v Light* [1954] VLR 152 at 155-157 (Sholl J); *R v Ladd; R v Murphy* (1958) 75 WN (NSW) 431 at 432-434 (Sugarman J); *R v Pett* (10 October 1957), reported in (1958) 75 WN (NSW) at 434.

59 *Vella* (2019) 269 CLR 219 at [29] (Bell, Keane, Nettle and Edelman JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [16] (Gleeson CJ), [116] (Gummow and Crennan JJ).

60 *Thomas* (2007) 233 CLR 307 at [116] (Gummow and Crennan JJ), referring to the discussion of these historical matters in *R v Wright; Ex parte Klar* (1971) 1 SASR 103.

43. Comparable jurisdictions which have considered the constitutional or quasi-constitutional limits of the justifying grounds on which bail may be denied to an accused person have concluded that pre-trial detention for the purpose of community protection is protective, rather than punitive, and constitutionally legitimate.

44. The Supreme Court of the United States addressed the constitutional validity of pre-trial detention based on "dangerousness" in *United States v Salerno*.[61] The Court upheld the validity of a provision of a federal bail law, which permitted a federal court to detain an arrested person pending trial if the government demonstrated by clear and convincing evidence that no bail conditions would "reasonably assure … the safety of any other person and the community". Those challenging the law argued that it violated the substantive due process clause in the United States *Constitution* because the detention it authorised constituted impermissible punishment before trial, and further, that the law violated the prohibition on "excessive bail" under the Eighth Amendment, on the basis that the Eighth Amendment confers a right to bail calculated solely on considerations of the likelihood that an accused would present to court.

45. A majority of the Court rejected both arguments. As to the first contention, the Court held that the pre-trial detention authorised by the Act was regulatory rather than penal, finding that the government's interest in preventing crime by arrestees was both "legitimate and compelling".[62] As to the second contention, the Court held that, although "*a* primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants", it is not the case that the Eighth Amendment "categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release".[63]

46. The Supreme Court of Canada has also upheld the constitutional validity of a law conferring a power to deny bail where necessary "for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence".[64] In so holding, the Supreme Court recognised, importantly, that although "danger or likelihood that an individual will commit a criminal offence does not in itself provide just cause for

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61 481 US 739 (1987).

62 *Salerno* 481 US 739 (1987) at 749 (Rehnquist CJ for the Court).

63 *Salerno* 481 US 739 (1987) at 753 (Rehnquist CJ for the Court) (emphasis added), see also at 754-755.

64 *Pearson* [1992] 3 SCR 665; *Morales* [1992] 3 SCR 711.

detention", the position is different where an individual who presents a danger of committing an offence is already awaiting trial for a criminal offence.[65] As already noted above, the Court considered that denial of bail in those circumstances is necessary to ensure the proper functioning of the bail system.

47. The risk that an accused person will commit offences while on bail has also been held to be a valid and legitimate ground for continued pre-trial detention under Art 5(3) of the *European Convention on Human Rights*, which provides that every person arrested or detained is entitled "to trial within a reasonable time or to release pending trial".[66] It is necessary only that the danger be a "plausible" danger and the measure be appropriate in light of all the circumstances.[67]

48. Although the Supreme Court of Ireland took a different view in *The People (Attorney-General) v O'Callaghan*,[68] characterising a refusal of bail "merely" on grounds that there is the likelihood an accused person will commit offences while on bail as an impermissible form of preventive detention, the Irish *Constitution* was subsequently amended to specifically allow the making of laws which authorise a court to refuse bail where "it is reasonably considered necessary to prevent the commission of a serious offence by that person".[69]

49. In this context, it can be readily concluded that, for the purposes of considering its compatibility with Ch III of the *Constitution*, a provision restricting the circumstances in which bail may be granted for certain offences for the purpose of protecting the community from the risk of an accused person offending while on bail is both non-punitive and constitutionally legitimate. As the defendant has highlighted at **DS [44]-[45]**, although the plaintiff in this proceeding has only challenged the constitutional validity of s 7A(2AB), if the plaintiff's arguments were accepted and followed through to their logical conclusions, any bail law that permits or requires bail to be refused solely to achieve a purpose other than ensuring an accused's presence at trial would "not have a non-punitive purpose": see **PS [30]-[34]**. This would be contrary

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65 *Morales* [1992] 3 SCR 711 at 736 (Lamer CJ, La Forest, Sopinka, McLachlin and Iacobucci JJ agreeing).

66 *Clooth v Belgium* (1992) 14 EHHR 717 at [40]. See also, eg, *Re An Application for Bail by Gregory Bernard Seears* [2013] ACTSC 187 at [28]-[29] (Refshauge J).

67 *Clooth* (1992) 14 EHHR 717 at [40].

68 [1966] IR 501.

69 *Sixteenth Amendment of the Constitution Act 1996* (Ireland).

to both history and comparative constitutional jurisprudence, would have potentially far-reaching consequences, and should be rejected.

Section 7A(2AB) is reasonably capable of being seen as necessary for the legitimate and non-punitive purpose it pursues

50. Finally, s 7A(2AB) is reasonably capable of being seen as necessary, in the sense of reasonably appropriate and adapted, for the legitimate and non-punitive purpose it pursues, having regard to the features of the law identified in paragraphs 29–34 above. Those features ensure s 7A(2AB) operates as an "appropriately tailored scheme for the protection of the community from the harm that particular forms of criminal activity may pose".[70]

51. In undertaking this assessment of means and ends, it is important to bear in mind that the right of a person charged with a criminal offence to be at liberty prior to the trial of the charge has always been conditional upon, or mediated by, a positive exercise of the power, where available, to grant bail (as the historical materials canvassed in both **PS [15]-[21]** and **DS [19]-[31]** show). In this respect, Victoria adopts the defendant's submission that a law such as s 7A(2AB) may not warrant characterisation as a law authorising detention at all, but rather, is properly characterised as a law regulating the entitlement to be at liberty in respect of detention which is otherwise authorised by law (**DS [52]-[56]**).

52. Even if the effect of the application of s 7A(2AB) is characterised as giving legal authority to a person's *continuing* detention, the overarching justification for an accused person's detention pending trial remains their charge for commission of a criminal offence. Accordingly, to the extent the principle in *Lim* (as adapted in recent jurisprudence) applies at all to laws regulating bail and grounds for pre-trial detention, the assessment of means and ends must be undertaken bearing in mind that that is the starting point for such persons, rather than any prima facie entitlement to be at liberty:[71] cf **PS [37]**. In these circumstances, s 7A(2AB) is readily seen as reasonably necessary for its protective purpose for the reasons discussed at paragraphs 29–34 above.

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70 *Garlett* (2022) 277 CLR 1 at [257] (Edelman J), quoting *Benbrika* (2021) 272 CLR 68 at [32] (Kiefel CJ, Bell, Keane and Steward JJ).

71 See also *Bail Act*, s 3(1) (definition of "bail": bail means "authorisation under this Act: (a) to be at liberty *instead of in custody*" (emphasis added)).

Part IV: Estimated time

53. Victoria estimates that it will require 15 minutes for oral argument.

Dated: 6 August 2026

Alistair Pound SC
Solicitor-General for Victoria
03 9225 8249
alistair.pound@vicbar.com.au

Elizabeth Brumby
Ninian Stephen Chambers
03 9225 8444
elizabeth.brumby@vicbar.com.au

ANNEXURE TO VICTORIA'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable dates
Australia					
1.	*Bail Act 1977* (Vic)	Authorised Version No 158 (30 September 2025 to 30 March 2026)	s 4F	Version in force as at the date of the application in *Re Altaee* [2025] VSC 720	15 October 2025
2.	*Bail Act 1982* (NT)	Current	ss 3, 3B, 7A, 19, 24, 24A, 43, 46	Currently in force	All relevant times
3.	*Commonwealth Constitution*	Current	Ch III	Currently in force	All relevant times
Other statutes					
4.	*Constitution of the United States*	Current	Fifth Amendment, Eighth Amendment	Illustrative purposes only	N/A
5.	*European Convention on Human Rights*	Current	Art 5	Illustrative purposes only	N/A
6.	*Sixteenth Amendment of the Constitution Act 1996* (Ireland)	As passed	Entire Act	Illustrative purposes only	N/A