



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

D15 of 2025

BETWEEN:

**NORTH AUSTRALIAN ABORIGINAL
JUSTICE AGENCY LIMITED**

Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

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

PART I: CERTIFICATION

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

PARTS II AND III: INTERVENTION/LEAVE TO INTERVENE

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

PART IV: ARGUMENT

A. Summary

3. The substantive questions stated for the Court are whether s 7A(2AB) of the *Bail Act 1982* (NT) is invalid for infringing the limits on Territory legislative power deriving from Ch III of the *Commonwealth Constitution* and whether it is incapable of being applied by s 68(1) of the *Judiciary Act*, as Commonwealth law, to persons charged with relevant offences against Commonwealth laws.
4. Western Australia submits that:
 - (a) The principle relevant to the validity of Territory legislation conferring Territory jurisdiction on Territory courts is that established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, and that principle is not to be applied simply by asking whether the law in question infringes the principle established in *Chu Khen Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 as contended by the plaintiff.
 - (b) However, the occasion for the application of the *Kable* principle does not arise in the present case because s 7A(2AB) would not offend Ch III of the *Constitution* had it been enacted by the Commonwealth. Section 7A(2AB) is therefore valid and capable of being applied as Commonwealth law by s 68(1) of the *Judiciary Act*. Questions 3 and 4 of the Special Case should be answered "no".
 - (c) Alternatively, s 7A(2AB) does not impair the institutional integrity of Territory courts and is therefore valid, whether it is capable of being applied by s 68(1) of the *Judiciary Act*. Question 3 of the Special Case should be answered "no", even if Question 4 is answered "yes".

5. Western Australia does not seek to be heard on the other questions raised by the Special Case. The issues addressed in these submissions will not need to be determined by the Court if the plaintiff is found not to have standing.

B. The *Kable* principle is different from the *Lim* principle, and it determines the validity of State and Territory laws

6. Western Australia agrees with the plaintiff's submissions about the separation of Commonwealth judicial power mandated by Ch III of the *Constitution* at PS [7] and [9]. A further principle underpinning the separation of the judicial power of the Commonwealth is that a Ch III court may only exercise the judicial power of the Commonwealth or a power incidental thereto – it may not exercise a non-judicial power that is not incidental to the exercise of a judicial power.¹
7. Consistently with *that* broader principle, the *Lim* principle prohibits the Commonwealth Parliament from authorising a Ch III court to involuntarily detain a person otherwise than as an incident of the adjudgment and punishment of criminal guilt except in those exceptional cases where the law is reasonably capable of being seen to be necessary (in the sense of reasonably appropriate and adapted) for a legitimate and non-punitive purpose.² That is because such a power is neither judicial nor incidental to judicial power (*Cf* PS [10]-[11]).
8. However, the Bail Act is Territory legislation conferring Territory jurisdiction on Territory courts (save insofar as it specifically refers to offences against Commonwealth laws). The strict separation of judicial power mandated by Ch III does not apply to the States and Territories and there is no equivalent separation of powers under the Constitutions of the States or the Self-Government Acts relating to the

¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Nicholas v The Queen* (1998) 193 CLR 173, [68] (Gaudron J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [62] (Gageler J), [144] (Gordon J).

² *Lim*, 27 (Brennan, Deane and Dawson JJ); *Benbrika*, [2], [15]-[16], [20], [28]-[29], [35]-[36], [48] (Kiefel CJ, Bell, Keane and Steward JJ), [62]-[65], [71]-[73], [76]-[78], [100], [102] (Gageler J), [109], [132]-[134], [140], [142], [145], [151], [155], [160], [177] (Gordon J); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [28]-[32] (Kiefel CJ, Bell, Jeane and Edelman JJ); *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, [39] (the Court).

Territories.³ The principle relevant to the limits on State and Territory legislation conferring State and Territory jurisdiction on Ch III courts is the *Kable* principle.⁴

9. 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 and Territory courts, State or Territory legislation which purports to confer upon a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with the court's role as a repository of federal jurisdiction, is constitutionally invalid.⁵
10. "No part of the [*Kable*] principle is to deny the validity of conferral on a State or Territory court by State or Territory legislation of a function merely because performance of that function would involve the court in an exercise of non-judicial power".⁶ Accordingly, the limitation placed by the principle on State and Territory legislative power is less than that placed on Commonwealth legislative power by the *Lim* principle.⁷
11. The notions of impairment of, or incompatibility with, institutional integrity are not readily susceptible of definition in terms which will dictate future outcomes, but the impairment or incompatibility must usually be in a "fundamental degree".⁸
12. Further, these notions "are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth".⁹
20. Accordingly, in applying the *Kable* principle, it is necessary to accommodate "the

³ *Kruger v The Commonwealth* (1997) 190 CLR 1, 44 (Brennan CJ), 62 (Dawson J), 108-109, 117, 141-142 (Gaudron J), 170 (Gummow J), 176 (Answers to questions reserved); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [22] (French CJ), [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ); *Benbrika*, [20] (Kiefel CJ, Bell, Keane and Steward JJ), [137], [155] (Gordon J).

⁴ *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, [41] (French CJ, Kiefel and Bell JJ), [115], [119]-[120], [122] (Gageler J), [182] (Keane J); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, [40], [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁵ *Emmerson*, [40], [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Garlett v State of Western Australia* (2022) 277 CLR 1, [57]-[59] (Kiefel CJ, Keane and Steward JJ), [116]-[118] (Gageler J), [181] (Gordon J), [241] (Edelman J), [286] (Gleeson J).

⁶ *Benbrika*, [81] (Gageler J). See also *Benbrika*, [20] (Kiefel CJ, Bell, Keane and Steward JJ), [158]-[159] (Gordon J); *Kable*, 96 (Toohey J), 103-104 (Gaudron J), 116-119 (per McHugh J), 127-128 (Gummow J).

⁷ *Benbrika*, [82] (Gageler J), [137] (Gordon J). See also *Fardon v Attorney-General of Queensland* (2004) 223 CLR 575, [36] (McHugh J), [106], [117] (Gummow J), [144(4)]-[144(5)] (Kirby J), [219] (Callinan and Heydon JJ); *Pompano*, [126] (Hayne, Crennan, Kiefel and Bell JJ), citing *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Garlett* [184] (Gordon J); *EGH19 v Commonwealth* (2026) 1000 ALJR 400, [128] (Gordon J).

⁸ *Garlett*, [242] (Edelman J). See also *Fardon*, [41]-[43] (McHugh J), [104] (Gummow J); *Pompano*, [124] (Hayne, Crennan, Kiefel and Bell JJ).

⁹ *Pompano*, [125] (Hayne, Crennan, Kiefel and Bell JJ).

accepted and constitutionally uncontroversial performance by the State courts of functions which go beyond those that can constitute an exercise of judicial power of the Commonwealth."¹⁰

13. Such accommodation does not permit "different grades or qualities of justice" within the meaning of that concept as used by Gaudron J in *Kable* (Cf PS [8]).¹¹

14. The plaintiff's submissions seek to merge the *Kable* principle and the *Lim* principle to the extent that they contend that the question of whether s 7A(2AB) substantially impairs the institutional integrity of the courts to which it applies can be answered simply by asking and answering the question of whether the provision infringes the *Lim* principle (PS [2], [11], [13]-[14], [21], [29]-[45]).

15. In effectively contending that a State or Territory law will be invalid if it infringes the *Lim* principle, which is directed to the characterisation of the purpose of a law as punitive or not and therefore judicial or non-judicial,¹² the Plaintiff adopts an approach that is inconsistent with the absence of a strict separation of powers at the State and Territory level (*Contra* PS [12]). It goes beyond simply applying the *Lim* principle "as a step" in the analysis required by the *Kable* principle (Cf PS [13]).

16. It may be accepted that the *Lim* principle and the *Kable* principle have complementary operation and that considerations relevant to the application of the former to Commonwealth legislation are also relevant to the application of the latter to State and Territory legislation (Cf PS [14]).¹³ It is therefore unsurprising that the Court's decisions in *Fardon* and *Garlett* concerning the validity of State laws "can be explained consistently" with the *Lim* principle (Cf PS [14]).

17. However, a majority of this Court has held that the questions posed by the *Lim* principle do not constitute or exhaust the analysis required to determine whether a State or Territory law authorising the detention of an individual infringes the *Kable* principle.

18. In *Garlett*, the appellant argued that the *High Risk Serious Offenders Act 2020* (WA) (**HRSO Act**) infringed the *Kable* principle because the power it conferred upon the

¹⁰ *Pompano*, [126] (Hayne, Crennan, Kiefel and Bell JJ).

¹¹ *Kable*, 103-104 (Gaudron J). See also *Benbrika*, [20] (Kiefel CJ, Bell, Keane and Steward JJ).

¹² *Jones v Commonwealth* (2023) 280 CLR 62, [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ*, [44] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

¹³ *Garlett*, [248] (Edelman J).

Supreme Court of Western Australia was not judicial power such as might be conferred upon a court exercising federal jurisdiction consistently with Ch III of the *Constitution* and the *Lim* principle.¹⁴

19. Kiefel CJ, Keane and Steward JJ held that whether the power was judicial or non-judicial in character was not determinative as to whether the *Kable* principle had been infringed and "the *Lim* principle has no application to establish the invalidity of the HRSO Act."¹⁵

10 20. Similarly, Edelman J observed that it was fundamental for an understanding of *Kable* "to appreciate that the *Kable* doctrine is distinct from the principles considered in [*Lim*], which are based upon the separation of powers at the Commonwealth level" and that the *Lim* principle did not answer the relevant question of whether the HRSO Act in its application to robbery unjustifiably compromised the institutional integrity of the Supreme Court.¹⁶

20 21. Gleeson J (who generally agreed with the reasons of the plurality) observed that it would be a significant step to conclude that the *Lim* principle operates as an additional constraint on State legislative power, over and above the *Kable* principle.¹⁷ Her Honour recognised that "the *Lim* principle was articulated as a constitutive part of the doctrine of the separation of Commonwealth judicial power, not as a doctrine about the nature of Ch III courts or the characteristics of Ch III courts that are essential to the institutional integrity of those courts, and not in answer to a question about the scope of State legislative power."¹⁸

22. Her Honour also said that there was reason to doubt the significance of the *Lim* principle for the *Kable* principle "at least for the purpose of a conclusion that the *Lim* principle is germane to the institutional integrity of a State court."¹⁹

23. Ultimately, all member of the majority determined the validity of the HRSO Act by reference to the *Kable* principle.

¹⁴ *Garlett*, 3, 5-9, 11-12, [39]-[40] (Kiefel CJ, Keane and Steward JJ), [247]-[248] (Edelman J), [293] (Gleeson J).

¹⁵ *Garlett*, [40] (Kiefel CJ, Keane and Steward JJ).

¹⁶ *Garlett*, [247]-[248], [256]-[259], [282]-[284] (Edelman J).

¹⁷ *Garlett*, [293] (Gleeson J).

¹⁸ *Garlett*, [294] (footnotes omitted) (Gleeson J).

¹⁹ *Garlett*, [306] (Gleeson J).

24. Further, in the earlier case of *Fardon*, the majority applied the *Kable* principle to determine the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).²⁰ They did not treat the *Lim* principle as determinative of the constitutional validity of the legislation, and several passages in the majority judgments in *Fardon*²¹ are inconsistent with the *Lim* principle as an exclusive test for whether State legislation offends the institutional integrity of a State court.²²

25. The plaintiff's submissions do not acknowledge that the argument it seeks to advance for the merger of the *Kable* principle and the *Lim* principle is based primarily on the reasoning of the dissenting judgements of Gageler J (as his honour then was) and Gordon J in *Garlett*²³ and/or that it is foreclosed by the majority reasoning in *Garlett* and *Fardon*. If the plaintiff wishes to advance the argument, it needs to seek leave to reopen *Garlett* and *Fardon* and persuade the Court to overrule them.²⁴

C. *Kable* does not arise for application as section 7A(2AB) would be valid if a Commonwealth law

26. While the questions posed by the *Lim* principle do not constitute or exhaust the analysis required to determine whether a State or Territory law authorising the detention of an individual infringes the *Kable* principle, "the 'occasion for the application of *Kable* does not arise' if the impugned State [or Territory] law would not offend Ch III had it been enacted by the Commonwealth Parliament for a Ch III court."²⁵

27. Section 7A(2AB) would not offend Ch III had it been enacted by the Commonwealth Parliament because:

- (a) it is not a law that relevantly authorises or requires the detention of an individual as contended by PS [2], [21], [28]-[29], [42], [45]); and/or

²⁰ *Garlett*, [8], [68] (Kiefel CJ, Keane and Steward JJ), [291] (Gleeson J).

²¹ *Fardon*, [12], [14], [20] (Gleeson CJ), [36]-[37], [40]-[41] (McHugh J), [85], [90], [106], [114]-[117] (Gummow J), [196]-[197] (Hayne J), [219] (Callinan and Heydon JJ).

²² *Garlett*, [298] (Gleeson J).

²³ PS [11].

²⁴ See, eg, *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 267 (Brennan J); *Vanderstock v Victoria* (2023) 98 ALJR 208, [7]-[8], [10], [133], [145], (Kiefel CJ, Gageler and Gleeson JJ), [206]-[207], [374], [425]-[439] (Gordon J), [606]-[612], [653]-[654], [665]-[666] (Edelman J), [709], [731], [749], [782]-[789], [808]-[811], [856], [933]-[940] (Steward J), [856], [886]-[887], [933]-[940] (Jagot J); *Vunilagi v The Queen* (2023) 97 ALJR 627, [153]-[158] (Edelman J).

²⁵ *Pompano*, [126] (Hayne, Crennan, Kiefel and Bell JJ), citing *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Benbrika*, [82] (Gageler J), [158] (Gordon J).

(b) it forms part of a legislative scheme that falls within one of the recognised categories of "exceptional case" where a law may authorise a Ch III court to involuntarily detain a person otherwise than as an incident of the adjudgment and punishment of criminal guilt (*Contra* PS [29]-[34], [45]).

28. Consequently, s 7A(2AB) is not only valid, but it is capable of being applied as Commonwealth law "by analogy" by s 68(1) of the Judiciary Act in respect of relevant offences against Commonwealth laws.²⁶

Section 7A(2AB) and the statutory scheme of which it forms part

10 29. Section 6 of the Bail Act (read with s 13) provides generally for the grant or refusal of bail to a person charged with, or convicted of, an offence (**accused**) in respect of certain periods so far as they relate to the offence of which the accused is charged or convicted. The term "bail" is relevantly defined in the Bail Act to mean "authorisation to be at liberty instead of in custody".²⁷ The periods in respect of which bail can be granted generally run from when the accused is charged with the offence through to trial, sentence and/or the determination of any appeal (and any remitted proceedings following an appeal), as relevant.

20 30. A grant of bail involves the accused entering into a bail undertaking and may involve them entering into one or more bail conditions.²⁸ A bail undertaking is generally a written undertaking that the accused will appear before such court, on such day and at such time and place as are specified in the undertaking.²⁹ Upon the grant of bail the accused is "entitled to be released from custody" until they are required to appear before a court in accordance with their bail undertaking.³⁰

31. Breach of a bail undertaking or a condition of the grant of bail constitutes an offence and renders a person liable to have their bail revoked.³¹ If an accused person fails to

²⁶ *R v McGregor* (2026) 100 ALJR 287, [16]-[18] (Gageler CJ, Gleeson and Beech-Jones JJ), [64]-[66] (Gordon and Steward JJ).

²⁷ It also includes authorisation to be released from the obligation to comply with a non-custodial order, however, given the basis of the plaintiff's challenge to s 7A(2AB) this aspect of the definition is not considered further.

²⁸ Bail Act, ss 7, 25.

²⁹ Bail Act, s 25.

³⁰ Bail Act, s 7. Although s 14 of the Act provides that an accused may be granted or refused bail even if they are not in custody.

³¹ Bail Act, ss 37B, 38.

appear before a court in accordance with a bail undertaking, the court may issue a warrant to apprehend them and bring them before the court.³²

32. Sections 7A, 8 and 9 of the Bail Act generally deal with the offences and circumstances in respect of which the requirement for bail can and cannot be dispensed with and there is a presumption in favour or against the grant of bail, while sections 7A(2AA), 7A(2AB), 7A(2A), 23A, 24 and 24A deal with the criteria to be considered in determining bail applications.

10 33. Sections 27 and 28 of the Bail Act deal with the conditions that must or may be imposed on a grant of bail and the considerations relevant to determining the conditions to be imposed. Seven of the nine conditions that may be imposed under s 27 relate to the agreement of money forfeitures by the accused person or an "acceptable person", with or without the provision of security, if the accused fails to comply with their bail undertaking and the surrender by the accused of their passport(s).

20 34. A person arrested by a Territory police officer (whether pursuant to a warrant or not) and charged with an offence, who is not released from custody or granted bail by an authorised police officer (a possibility for adult accused only)³³ or the Local Court or Youth Justice Court via telephone, must be brought before the Local Court or Youth Justice Court as soon as practicable after being taken into custody, although they may be held in custody for a reasonable period pre or post charge to enable a member of the Police Force to question them or carry out investigations.³⁴

35. The power of the Local Court or the Youth Justice Court to decide whether to grant or refuse bail to an accused charged with an offence of a kind specified in s 7A(1) of the Bail Act (**s 7A offence**) first arises when the person is brought before it by a police officer, save for those cases in which the court deals with an application for bail via telephone.³⁵

36. In relation to an accused charged with a s 7A offence who is brought before the Local Court or the Youth Justice Court by a police officer following their arrest, ss 59, 60

³² Bail Act, s 39.

³³ Section 22(3) of the *Youth Justice Act 2005* (NT) provides that a youth charged with a s 7A offence cannot be released on bail by a police officer after being charged

³⁴ *Police Administration Act 1978* (NT), ss 121, 123, 124, 137; Bail Act, ss 3AA, 7A, 16, 20(2); Youth Justice Act, ss 27, 53(1A) and (2).

³⁵ Bail Act, ss 3AA, 20(2); Youth Justice Act, s 53(1A).

and 65 of the *Local Court (Criminal Procedure) Act 1928* (NT) and s 24 of the Youth Justice Act require and empower the court to remand the accused into custody if they do not grant them bail under the Bail Act.³⁶

37. Thereafter, the power of the Local Court or Youth Justice Court to grant or refuse bail to such an accused who has been remanded in custody throughout any of the periods referred to above during which the court has jurisdiction arises when an accused is brought, or appears, before the court and/or on a relevant application being made.³⁷ On each occasion the Court has to determine that issue, it is required to remand the accused into custody if it does not grant them bail.

10 38. If the Local Court or Youth Justice Court directs that an accused be tried or sentenced in the Supreme Court in relation to an indictable s 7A offence, it must remand the accused into the custody of the Commissioner of Correctional Services until the trial or sentencing unless it grants them bail.³⁸ Thereafter, the power of the Supreme Court to decide whether to grant or refuse bail to an accused who has been remanded in custody will arise when the accused is brought, or appears, before it and/or a relevant application is made.³⁹ Section 334 of the Criminal Code confers power on the Supreme Court to remand an accused who has been committed or remanded for trial on indictment upon any adjournment of the trial.⁴⁰

20 39. The Supreme Court also has power to grant or refuse bail if an accused who has been convicted of a s 7A offence is in custody and appeals their conviction or sentence to the Supreme Court or the Court of Criminal Appeal or review is sought by the Supreme Court of a bail decision made by the Local Court.⁴¹

40. If bail is granted, it continues in effect until revoked (as a result of a breach of a bail undertaking or bail condition or a review under Part 6) or the charge against the

³⁶ See also Bail Act, s 7A(3). Section 59 of the Criminal Procedure Act applies when the accused has been arrested pursuant to a warrant whereas s 65 applies when the accused has been arrested without a warrant.

³⁷ Bail Act, ss 3AA, 7A(3), 19, 20, 21; Criminal Procedure Act, ss 63A(3), 65, 113, 114, 168; Youth Justice Act, ss 53(1) and (1A), 65. Section 32 of the Bail Act deals with when the Local Court or Youth Justice Court may continue bail already granted in respect of the offence, whether or not the accused person then appears in person.

³⁸ Criminal Procedure Act, ss 112, 136; Bail Act, ss 7A(3); Youth Justice Act, ss 53(1) and (1A).

³⁹ Bail Act, ss 3AA, 7A(3), 19, 21, 23; *Criminal Code Act 1983* (NT), s 334. Section 32 of the Bail Act deals with when the Supreme Court may continue bail already granted in respect of the offence, whether or not the accused person then appears in person.

⁴⁰ *Abdat v General Manager, Darwin Correctional Centre* [2025] NTSC 13, [14] (Grant CJ).

⁴¹ Bail Act, ss 23, 23A, 35, 36; Criminal Procedure Act, s 163.

accused is determined.⁴² If an accused charged with, or convicted of, a s 7A(1) offence is on bail and is found by a court to have breached their bail undertaking or a condition of bail, the court is required to revoke their bail and commit the person into custody, although that does not prevent bail from being granted to them again.⁴³

41. Section 7A offences comprise mostly indictable offences. The application of the provision to certain summary or "either-way" offences is generally qualified by additional criteria. For example, offences of the kind referred to in s 7A(1)(dg) may potentially include summary offences, but they are only s 7A offences if they have been committed in breach of a suspended imprisonment order imposed for some other prior offence. Offences against s 120 of the *Domestic and Family Violence Act 2007* (NT), which are summary offences if not committed in aggravating circumstances, are only s 7A offences if the accused:

- (a) has at any time before the date of the alleged offence, been found guilty of certain specified indictable or "either-way" offences (including murder, serious harm, assaults on workers or police or emergency workers, sexual intercourse without consent, compelling sexual intercourse or penetration without consent, gross indecency without consent, and sexual intercourse and gross indecency without consent under the now repealed s 192 of the Criminal Code);⁴⁴
- (b) has within the period of 2 years immediately preceding the date of the alleged offence, been found guilty of a "DVO contravention offence" (a previous offence against s 120 or an equivalent order from another jurisdiction or a contravention of a restraining order under the repealed *Domestic Violence Act 1992* (NT));⁴⁵
- (c) is alleged to have committed the offence while on bail for a "prescribed offence" or "serious offence";⁴⁶ or
- (d) has, within the period of 2 years immediately preceding the date of the alleged offence against s 120, been found guilty of 2 or more "prescribed offences" or

⁴² Bail Act, s 38.

⁴³ Bail Act, ss 38(2A), (3), (4).

⁴⁴ Bail Act, s 7A(1)(dd).

⁴⁵ Bail Act, s 7A(1)(dh).

⁴⁶ Bail Act, ss 3B, 7A(de); *Bail Regulations 1983* (NT), reg 2A(c).

"serious offences", or any combination of them, for which a conviction was recorded.⁴⁷

42. Further, all "prescribed offences" are indictable offences save for five summary offences and one "either-way" offence.⁴⁸ "Prescribed offences" are only s 7A offences if the accused is alleged to have committed the offence while on bail for a "prescribed offence" or "serious offence" or has within the period of 2 years immediately preceding the date of the alleged offence been found guilty of 2 or more "prescribed offences" or "serious offences", or any combination of them, for which a conviction was recorded.⁴⁹

Section 7A(2AB) does not authorise or require detention

- 10 43. It follows from the above that s 7A(2AB) is not a provision that authorises or requires the detention of an accused in the custody of the State. Section 7A(2AB) (together with ss 7A(2A), 23A, 24 and 24A) governs the criteria to be considered and applied by a court when deciding whether to grant or refuse a bail in respect of an accused charged with, or convicted of, a s 7A offence pursuant to ss 6, 13 and 20 or 23 of the Bail Act. Section 7A(2AB) operates to require the refusal of a grant of bail in certain circumstances.
- 20 44. A decision by the Local Court or the Supreme Court whether to grant or refuse bail to an accused charged with a s 7A offence is made in respect of an accused already in the custody of the State, having been arrested by a police officer or remanded following a previous refusal of bail or imprisoned pursuant to a sentence following conviction.⁵⁰ On the facts in the Special Case, there is no basis to conclude that summonses are issued⁵¹ instead of warrants for accused charged with s 7A offences (in respect of whom there is a presumption against bail) generally or in respect of the plaintiff's clients.
45. Bail is a form of conditional release *from custody* which represents a compromise between the most effective measure for ensuring an accused will be available to be

⁴⁷ Bail Act, ss 3B, 7A(dea); Bail Regulations, reg 2A(c).

⁴⁸ Bail Act, s 3B. The summary offences are the offences against ss 241(3) and (5), 213(2) and 218(1) of the Criminal Code and s 120 of the Family Violence Act. The either-way offence is the offence against s 188A of the Criminal Code.

⁴⁹ Bail Act, ss 7A(de), (dea).

⁵⁰ A decision by either court on a review under Part 6 of the Bail Act is made by way of rehearing the original application.

⁵¹ Criminal Procedure Act, ss, 22, 57, 104; Police Administration Act, s 121(1)(b); Bail Act, s 14; Youth Justice Act, ss 22, 53(2).

dealt with by the courts (detention in custody) and other competing interests such as the presumption of innocence and the impact of custody on an accused and their family. Any decision to refuse bail to an accused charged with a s 7A offence is a decision not to release them *from custody* (being the custody of the Territory to which they are already subject and to which they will continue to be subject if bail is not granted).

46. While it may be accepted that a decision to refuse bail made having regard to s 7A(2AB) renders an accused liable to remain in the custody of the Territory (*Cf* PS [28]), it is ss 59, 60, 65, 112, 113 and 136 of the Criminal Procedure Act, ss 24 and 65 of the Youth Justice Act, s 38(3)(b) of the Bail Act and s 334 of the Criminal Code (depending on the charge and circumstances), read in conjunction with s 7A(3) of the Bail Act,⁵² that authorise or require the accused to be kept in custody following a refusal of bail, not s 7A(2AB).⁵³

Further or alternatively, s 7A(2AB) is part of a legislative scheme that falls within an exceptional case recognised by Lim

47. In *Lim*, Brennan, Deane and Dawson JJ identified "the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts" as "the most important" exception to the general proposition that the power to involuntarily detain a person is, under the separation of powers, an exclusively judicial power.⁵⁴

48. Their Honours were there focused on the exceptional categories of executive powers to involuntarily detain individuals that do not infringe the separation of powers. However, consistent with the recognition that the *Lim* principle limits the powers that may be conferred on Ch III courts and not just on the executive, it has also been recognised that judicial orders detaining a person following refusal of bail pending trial would also fall within an exceptional category of case.⁵⁵

49. In *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, Gageler J observed that "[t]he power to detain an accused person in custody or to impose conditions of

⁵² And in the case of a person convicted of a s 7A offence denied bail pending determination of an appeal, it is the sentence of imprisonment that authorises and requires their detention in custody.

⁵³ Compare *Falzon*, [10], [12]-[13], [53]-[57], [63] (Kiefel CJ, Bell, Keane and Edelman JJ), [69], [83]-[87] (Gageler and Gordon JJ, Nettle J agreeing).

⁵⁴ At 28.

⁵⁵ *Benbrika*, [219] (Edelman J). See also *Fardon*, [163] (Kirby J).

bail constraining the liberty of the accused person pending trial for a criminal offence is different in so far as it 'is not seen by the law as punitive or as appertaining exclusively to judicial power'. As a power ancillary to the process of adjudging and punishing criminal guilt, it lies within the category of powers not independently judicial in nature which can be committed to courts as 'incidents in the exercise of strictly judicial powers'."⁵⁶

- 10 50. In the present case, the detention in custody of an accused charged with, or convicted of, a s 7A offence pending their trial or sentence or determination of their appeal, following a refusal of bail on the basis of s 7A(2AB), is reasonably capable of being seen to be necessary for the legitimate and non-punitive purpose of ensuring the person is available to be dealt with by the Northern Territory courts (*Contra* PS [30]-[31]).⁵⁷ That that is the purpose of the legislative remand scheme of which s 7A(2A) forms part is evident from its terms and structure.
51. Section 7A(2AB) is part of a statutory scheme that regulates when an accused charged with, or convicted of, a s 7A offence may be granted liberty and not remanded in custody to ensure their availability to be dealt with by the courts. It reflects a judgment by the Northern Territory Parliament as to a class of accused who should not be granted liberty to live in the community while awaiting trial, sentence or determination of their appeal.
- 20 52. As a decision by a Northern Territory court to grant bail to an accused charged with, or convicted of, a s 7A offence is a decision to release them *from custody*, it is, like a grant of parole, an "enhancement of the liberty of a person".⁵⁸ By restricting the circumstances in which bail may be granted to an accused charged with, or a person convicted of, a s 7A offence, s 7A(2AB) operates to limit the circumstances in which a court can enhance their liberty. It does not subject them to the imposition of any new or additional restriction on their liberty (*Cf* PS [34]).⁵⁹
53. Section 7A(2AB) is less restrictive in its effect than a provision that prohibits bail being granted to a person accused of certain serious offences at all (*Cf* DS [20], [27],

⁵⁶ *Vella*, [157] (Gageler J) (footnotes omitted). See also *EGH19*, [107] (Gordon J).

⁵⁷ *Lim*, 28 (Brennan, Deane and Dawson JJ). See also *EGH19*, [318(1)] (Jagot J).

⁵⁸ *EGH19*, [107] (Gordon J), [208] (Edelman J).

⁵⁹ Compare *Cherry v Queensland* (2025) 99 ALJR 782, [44]-[48] (the Court).

[29]) or unless "exceptional circumstances" exist to justify bail, eg, s 15AA of the *Crimes Act 1914* (Cth).⁶⁰

54. The risk of an accused charged with, or convicted of, a s 7A offence, who is not assessed as to be suitable to participate in a rehabilitation program of a kind referred to in s 7A(2A), committing a "prescribed offence" or "serious violence offence" or otherwise endangering the safety of the community is relevant to the risk of them failing to appear at court or being harmed if granted bail for the reasons given in DS [63].⁶¹
- 10 55. It is not suggested that the former is a precise, or the sole, measure of the latter. However, that s 7A(2AB) requires a Northern Territory court to consider the former risk when deciding whether to enhance the liberty of an accused or convicted offender, does not mean that, if bail is refused, the ultimate or "true" purpose of their detention is no longer to ensure they are available to be dealt with by the court.
56. Section 7A(2AB) does not convert the true purpose of their detention following a refusal of bail into "preventative detention" or "protective punishment" of the kind considered in *Fardon*, *Garlett* or *Benbrika* or the mere prevention of the commission of a criminal offence or the mere prevention from any harm of any nature, degree or extent (*Cf* PS [33], [37]-[38]-[40]).⁶²
- 20 57. However, to the extent it could be said that prevention of harm from serious or repeated criminal offending was a secondary purpose of detention following a refusal of bail, that is a legitimate purpose in the context of a bail law even if the harm is not "grave and specific".⁶³
58. In *Fardon*, Kirby J drew a clear distinction between the provision in the *Bail Act 1980* (Qld), which provided for consideration in bail decisions of whether there was an unacceptable risk that while released the accused would commit an offence, and the post-sentence preventative detention in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). His Honour observed: "there is a great difference between refusal of bail in respect of a pending charge of a past offence and refusal of liberty, potentially

⁶⁰ *Cf Chau v Director of Public Prosecutions* (1995) 37 NSWLR 639, 658 (Kirby P).

⁶¹ See also *Chau*, 655 (Kirby P).

⁶² *Cf Benbrika*, [79] (Gageler J).

⁶³ *Garlett*, [145], [148] (Gageler J), [190] (Gordon J), [310] (Gleeson J); compare [76]-[88] (Kiefel CJ, Keane and Steward JJ).

for very long intervals of time, in respect of estimations of future offending, based on predictions of propensity and submitted to proof otherwise than by reference to the criminal standard of proof".⁶⁴

59. That ensuring an accused charged with a s 7A offence is brought before the court is the ultimate non-punitive purpose of their remand is reinforced by the requirement in s 40 of the *Correctional Services Act 2014* (NT) that the General Manager of a custodial correctional facility must ensure that, to the extent it is practicable, persons detained on remand are kept separate from sentenced prisoners.⁶⁵

10 60. In *NZYQ*, the relevant provisions of the *Migration Act 1958* (Cth) authorising executive detention were held to be invalid in their application to unlawful non-citizens who had failed to obtain permission to remain in Australia and whose removal from Australia had no real prospect of becoming practicable in the reasonably foreseeable future. This was because, in respect of such non-citizens, the detention was not capable in fact of achieving the purpose of making them available for deportation or enabling an application for permission to remain in Australia to be determined.⁶⁶

20 61. By contrast, given the only way of *ensuring* an accused is available to be dealt with by the courts is to detain them in custody (*Compare* PS [41] "no grant of bail is risk free"), it cannot be said that the detention of persons accused or convicted of s 7A offences (for a duration linked that purpose) is not reasonably capable of being seen to be necessary (in the sense of reasonably appropriate and adapted) for that purpose.⁶⁷

62. It is not to the point that the Northern Territory Parliament could have adopted other means of achieving that purpose or that ss 24 and 24A of the Bail Act are more closely tailored (*Cf* PS [40], [44]).⁶⁸

63. PS [36], [40] and [44] overlook that, in a context where there is no common law or statutory right to bail in the Territory⁶⁹ and bail is an enhancement of liberty, detaining an accused or convicted offender following a refusal of bail serves the purpose of making them available to be dealt with by the court even if the statutory criteria for the

⁶⁴ *Fardon*, [171] (Kirby J).

⁶⁵ *Benbrika*, [39] (Kiefel CJ, Bell, Keane and Steward JJ).

⁶⁶ *NZYQ*, [39]-[41], [44]-[46] [52]-[54] (the Court).

⁶⁷ *Jones*, [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

⁶⁸ *Falzon*, [25]-[33] (Kiefel CJ, Bell, Keane and Edelman JJ); *Jones*, [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [84] (Gordon J). Contrast *Jones*, [150]-[154], [162], [183] (Edelman J).

⁶⁹ *Chau*, 646 (Gleeson CJ, Powell JA agreeing), 658 (Kirby P); Bail Act, ss 7A, 8, 16, 19, 49.

assessment of whether to grant bail do not specifically refer to, or attach paramount weight to, the risk of the accused or convicted offender not being available to be dealt with by the court if granted bail.⁷⁰

64. It cannot be said that s 7A(2AB) and the statutory scheme of which it forms part has no sufficient or rational connection with ensuring the availability of accused to be dealt with by the courts.⁷¹

65. As the pre-Federation history presented in DS [17]-[31] shows, English and Australian bail regimes have long imposed restrictions on the classes of persons in respect of whom, and the offences (particularly the serious offences) in respect of which, bail may be granted and required consideration of factors other than the risk of an accused failing to appear at court or being harmed if granted bail. This history also shows that those restrictions and considerations have changed over time. The post-Federation history of Australian bail laws is no different.⁷²

66. Historical practices in relation to bail necessarily inform any contemporary understanding of judicial power under Ch III of the *Constitution*.⁷³ They are also relevant to an assessment of whether a function conferred on a court is one that impairs its institutional integrity.⁷⁴

D. In any event, s 7A(2AB) does not impair the institutional integrity of Territory courts

67. In addition to the matters referred to in DS [66]-[73] and [76], the following features of the statutory scheme support the conclusion that s 7A(2AB) does not confer functions or powers on Northern Territory courts that substantially impair their institutional integrity.

⁷⁰ Compare *Chau*, 646-647 (Gleeson CJ, Powell JA agreeing), 657-658 (Kirby P); *Falzon*, [25]-[33] (Kiefel CJ, Bell, Keane and Edelman JJ); *Jones*, [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [84] (Gordon J). Contrast *Jones*, [150]-[154], [162], [183] (Edelman J).

⁷¹ Compare *Jones*, [162], [183] (Edelman J).

⁷² *Chau*, 644 (Gleeson CJ, Powell JA agreeing). Lachlan Auld and Julia Quilter, 'Changing the Rules on Bail: An Analysis of Recent Legislative Reforms in Three Australian Jurisdictions'(2020) 43(2) *UNSW Law Journal* 642, 643-644, 647-649, 669-673; A McDonald, M McAlister and S Bricknell, 'Bail and remand across Australia' (Research Report, Australian Institute of Criminology, Canberra, 5 February 2026) 3-7.

⁷³ *Benbrika*, [67] (Gageler J); *Jones*, [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Cf PS [35].

⁷⁴ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 26 (Gaudron J).

68. *First*, Part 6 of the Bail Act provides for bail decisions to be reviewed by way of rehearing by the Local Court, Youth Justice Court or the Supreme Court⁷⁵ and a person's right to seek review of a decision to refuse bail does not generally prevent them from making a fresh application for bail.⁷⁶
69. *Second*, the courts retain their inherent or implied powers to ensure fairness and prevent injustice in the conduct of their proceedings.⁷⁷
70. *Third*, the task of determining whether the criteria in s 7A(2AB) are satisfied involves a court in the application of a standard which is sufficiently precise to engage the exercise of judicial power. The criteria require the court to consider the risk referred to in the context of the potential bail conditions that could be imposed in the ordinary way. The fact that the compass of the determination is relatively narrow at the second step of the two-step process required by s 7A⁷⁸ does not detract from the fact that it is a proper adjudicative process which properly engages judicial power (*Cf* PS [41]). Nor does the fact that it imposes an onus on the accused or requires them to satisfy the court to a "high degree of confidence" of criteria specified in negative terms.⁷⁹
71. *Fourth*, this is not a case where the Bail Act enlists Northern Territory courts in the implementation of legislative or executive policies of the Territory, or where it requires the courts to depart to a significant degree from the methods and standards which have historically characterised judicial power.⁸⁰

⁷⁵ Youth Justice Act, s 53(1A).

⁷⁶ Bail Act, s 37.

⁷⁷ See, eg, *Fairweather v Harrison* [2026] NTSCFC 1.

⁷⁸ *R v Abuelheish* (2025) 396 FLR 73, [24]-[29] (Reeves J).

⁷⁹ *Milicevic v Campbell & Commonwealth of Australia* (1975) 132 CLR 307, 315-317 (Gibbs J), 318-319 (Mason J); *Sorby v Commonwealth* (1983) 152 CLR 281, 298-299 (Gibbs CJ); *Nicholas*, [20], [24]-[26] (Brennan CJ), [48], [53] (Toohey J), [67], [72]-[74], [79]-[80] (Gaudron J), [123] (McHugh J), [152]-[154] (Gummow J), [232]-[238] (Hayne J); *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; *Fardon*, [41] (McHugh J).

⁸⁰ Compare *South Australia v Totani* (2010) 242 CLR 1, [131] (Gummow J), [428] (Crennan and Bell JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [52] (French CJ).

PART V: LENGTH OF ORAL ARGUMENT

72. It is estimated that oral argument for Western Australia will take no more than 15 minutes.

Dated: 6 August 2026




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J E Shaw SC
Solicitor-General for Western Australia
Email: j.shaw@sg.wa.gov.au
Ph: 08 9264 1806

J F Bennett
Senior Assistant State Counsel
Email: j.bennett@sso.wa.gov.au
Ph: 08 9264 1827

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA (INTERVENING)

Pursuant to Practice Direction No 1 of 2024, Western Australia sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
Constitutional provisions					
1.	<i>Commonwealth Constitution</i>	Compilation No 6 (29 July 1997 to present)	Ch III	Currently in force	All relevant times
Statutory provisions					
Commonwealth legislation					
2.	<i>Crimes Act 1914</i> (Cth)	Compilation No 225 (4 June 2026 to present)	s 15AA	Illustrative purposes	N/A
3.	<i>Judiciary Act 1903</i> (Cth)	Compilation No C51 (11 December 2024 to present)	ss 68(1), 78A	Currently in force	All relevant times
4.	<i>Migration Act 1958</i> (Cth)	Compilation No C153 (17 February 2023 to 23 June 2023)	ss 189(1), 196(1)	Version considered in <i>NZYQ</i>	28 November 2023 (date of decision in <i>NZYQ</i>)
State legislation					
5.	<i>Bail Act 1980</i> (Qld)	As made (1 July 1980)	s 16(1)(a)(ii)(A)	Version considered in <i>Fardon</i>	1 October 2004 (date of decision in <i>Fardon</i>)
6.	<i>Bail Act 1982</i> (NT)	Current	ss 3AA, 3B, 6, 7, 7A, 8, 9, 13, 14, 16, 19, 20, 21, 23, 23A, 24, 24A, 25, 27, 28, 32, 35, 36, 37, 37B, 38, 39, 49, Pt 6	Currently in force	All relevant times
7.	<i>Bail Regulations 1983</i> (NT)	Current	reg 2A(c)	Currently in force	All relevant times

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
8.	<i>Correctional Services Act 2014</i> (NT)	Current	s 40	Illustrative purposes	N/A
9.	<i>Criminal Code Act 1983</i> (NT)	Version in force between 1 June 1994 and 25 March 2024	s 192	Historical comparison	1 June 1994 to 25 March 2024
10.	<i>Criminal Code Act 1983</i> (NT)	Current	ss 188A, 213(2), 218(1), 241(3), 241(5), 334	Currently in force	All relevant times
11.	<i>Dangerous Prisoners (Sexual Offenders) Act 2003</i> (Qld)	As made (6 June 2003)	ss 8, 13	Version considered in <i>Fardon</i>	1 October 2004 (date of decision in <i>Fardon</i>)
12.	<i>Domestic and Family Violence Act 2007</i> (NT)	Current	s 120	Currently in force	All relevant times
13.	<i>Domestic Violence Act 1992</i> (NT)	As made (1 January 1994 to 30 June 2008)	All	Historical comparison	Prior to 1 July 2008
14.	<i>High Risk Serious Offenders Act 2020</i> (WA)	Version in force between 26 August 2020 and 12 April 2023	ss 7, 8, 29, 30(2), 30(5), 46, 48	Version considered in <i>Garlett</i>	7 September 2022 (date of decision in <i>Garlett</i>)
15.	<i>Local Court (Criminal Procedure) Act 1928</i> (NT)	Current	ss 22, 50, 57, 59, 60, 63A(3), 65, 104, 112, 113, 114, 136, 163, 168	Currently in force	All relevant times
16.	<i>Police Administration Act 1978</i> (NT)	Current	ss 121, 123, 124, 137	Currently in force	All relevant times
17.	<i>Youth Justice Act 2005</i> (NT)	Current	ss 22, 24, 27, 53, 65	Currently in force	All relevant times