



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED
Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

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PLAINTIFF'S REPLY

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PART I: CERTIFICATION

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

PART II: REPLY

2 **Standing.** NAAJA does not seek to “roam” beyond the facts in the Special Case; its case concerns the application of s 7A(2AB) by courts to accused persons whose guilt is yet to be adjudged or punished: **SCB 13 [21], 49-54 [15]-[43]; Cth [5]; cf DS [8], [39]**. As to standing, the Territory does not advance any principled reason for why the concession made in *SDAEA* was wrong. The primary authorities cited by the Territory (**DS [5]**) predate the adoption and development of the “sufficient interest” test. Further, NAAJA adopts
10 **Cth [40]-[44]** and thus the standing issue falls away, at least on Question 4.¹

3 **Law authorising detention.** The Territory seeks to withdraw its admission in its Defence (signed by the Solicitor-General) and its agreement in the Special Case, that the legal and practical effect of a court’s decision to refuse bail under s 7A(2AB) is to require and authorise the detention of that person. The Territory provides no explanation for this late change of position (**DS [56]**), but it appears to be motivated by a desire to characterise a person charged with an offence as being in a default and ongoing “state of detention” on remand, such that a grant of bail is “liberty enhancing”: **DS [14], [53]-[54], [59]**. That characterisation is inconsistent with principle and the statutory scheme.

4 The observation that there is “no right to bail” at common law (**DS [54], Vic [24], WA [63]**)
20 conveys only that bail at common law involves a *discretionary* power.² It does not deny the common law position “that prima facie every accused is entitled to his freedom until he stands trial”.³ Gleeson CJ’s statement in *Chau* cannot be transformed to mean that upon the executive alleging the commission of an offence, an accused person’s liberty interest is forfeited absolutely, and that they will be detained absent conferral of a “statutory right” to release: cf **DS [53], [64], Vic [52]**. That is to invert basic principle: “The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes”.⁴

5 The Territory refers to a “range of powers” pursuant to which certain courts may remand a person: **DS [52], [40]-[42], WA [36], [46], Tas [42]**. But those express powers are limited
30 in their operation, for example: the remand power in s 60 of the *Local Court (Criminal*

¹ *Bell Group NV (in Liq) v WA* (2016) 260 CLR 500 at [7] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

² *Chau* (1995) 37 NSWLR 639 at 646 (Gleeson CJ), see also 643 (referring to the “general right to be at liberty”). His Honour’s comment as to Ch III (**DS [54]**) concerned bail not being essential to fair process.

³ *R v Fisher* (1964) 14 Tas R 12 at [3] (Crawford J).

⁴ *Williams* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ); **PS [28]**.

Procedure) Act 1928 (NT) (within Part IV) concerns only summary offences (cf **DS [40]**); there is no express power that authorises the remand of a person brought before the Local Court in connection with charges for an indictable offence (except during the adjournment of a preliminary examination:⁵ **DS [41]**); the express provisions only permit the Local Court to order remand for a maximum of 15 days (ss 60(3)(b), 113(3)); and there is no express power for the Supreme Court to remand a person between committal and the commencement of a trial (**DS [42]**). It is therefore unsurprising that the Territory initially made the admission it now seeks to withdraw — if the admission is wrong, there are large holes in the scheme governing remand in the Territory.

- 10 6 Regardless of the source of the power to detain, once a bail application is made, it is the Bail Act that supplies the rules governing whether a person will be detained or released.⁶ A necessary corollary of a court exercising the power to refuse bail under s 7A(2AB) (read with ss 13, 20 and 23 of the Bail Act, if needed) is that the court will exercise a remand power. Henceforth, it is that exercise of power that authorises detention. It is therefore wrong to assume the statutory scheme automatically authorises the ongoing detention of an individual, simply because the person has been charged: **DS [14]**, **[53]**, **Vic [51]**, **WA [44]**. Once that faulty assumption is discarded, bail cannot properly be characterised as “an enhancement of liberty”: **DS [53]**, **[59]**, **[64]**, **WA [63]**.
- 20 7 **History.** The historical statutes regulating the grant of bail (**DS [20]-[31]**, **[76]**, **Cth [26]-[28]**), including by references to types of offences, concerned the grant of bail by sheriffs and justices of the peace.⁷ Those statutes did not constrain the superior courts, which had the discretionary power under common law to “bail for any crime whatsoever ... according to the circumstance of the case”.⁸ It is therefore an overstatement to say there is a “very long history of the legislature regulating who can get bail at all”: **DS [13]**, **[34]**. Further, there is no apparent basis in the historical sources for the suggestion that the rationale in certain offences being non-bailable may have been “the prevention of future crimes”: **PS [16]-[17]**, cf **Cth [26]-[27]**, **[38]**, **Tas [12]**. The earliest cases where the risk of offending on bail was treated as a relevant consideration date from the mid-20th century: **Cth [28]-[30]**, **Tas [13]**. It is therefore also an overstatement to say that the “ancient

⁵ *Local Court (Criminal Procedure) Act 1928* (NT) s 113(1), see also s 100 (definition of “committal date”).

⁶ As is acknowledged at **WA [37]**, **[43]-[45]**, **Vic [23]**, **NSW [46]**, **Tas [16]**. The express powers in the *Local Court (Criminal Procedure) Act 1928* (NT) also refer to the Bail Act as governing the issue: ss 59 and 114.

⁷ Stephen, *A History of the Criminal Law of England: Volume I* (1883) at 234, 237-238, 240, 243.

⁸ Blackstone, *Commentaries on the Laws of England* (1830) at 299. See also Chitty, *A Practical Treatise on the Criminal Law* (1816) at 98; *Forrest v Huffa* [1968] SASR 341 at 342-343 (Bray CJ); **Tas [7]**.

common law” jurisdiction to grant bail recognised that such a matter “could be a relevant, and in some cases determinative, consideration”: **Cth [31]**.

8 **Kable and Lim**. Where a Commonwealth law confers upon *any* “court” a power to detain a person outside the paradigm of the adjudgment and punishment of criminal guilt, it is necessary to ask whether the power is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose (**the Lim question**): see **Cth [14]**, **NSW [20]**, **SA [21]**, **Qld [10(a)]**, **WA [16]**. In that context, the *Lim* question is not asked for the purpose of determining whether the power is judicial or non-judicial, and is therefore not concerned with maintaining a strict separation of judicial power: cf **Cth [13]**, also **DS [16]**, **[74]**,
10 **Vic [9]**, **Qld [12]-[15]**, **WA [15]**. In that context, the *Lim* question is instead asked for the purpose of determining whether the Commonwealth law substantially impairs the “institutional integrity” of the “court”: see **PS [9]-[12]**. In that context, the question is concerned with the “essential characteristics” of the relevant “court”.⁹ Once that is recognised, the real question is: why would the position be any different for an equivalent State or Territory law?: cf **Vic [13]**.

9 The absence of a strict separation of powers at the State and Territory level does not answer the question. That absence is instead a matter that may inform the answer to the *Lim* question, along with other matters of history: **DS [76]**, **Cth [14]**, **[19]**.¹⁰ Recourse to the expression “court of a State” does not answer the question either (cf **NSW [14]-[15]**),
20 because the “essential characteristics” of all Ch III “courts” are uniform (**SA [14]**). Nor does *Garlett* provide the answer. There, the State law authorised detention by a “court” that was reasonably capable of being seen as necessary for a legitimate and non-punitive purpose: **PS [14]**. It is only on that basis that the plurality could have concluded that “[e]ven if the HRSO Act were a law of the Commonwealth, it would not contravene the *Lim* principle”. That conclusion explains the plurality’s observation that “the *Lim* principle has no application to establish the invalidity of the HRSO Act”.¹¹ The plurality did not say the *Lim* principle cannot apply to establish the invalidity of a State law: cf **DS [75]**; **NSW [16]**,
30 **WA [19]**, **[25]**. Nor did any judge in *Fardon*: cf **WA [25]**. The question is also not answered by appealing to the notion that it may be possible for a State or Territory law to confer power on the State or Territory executive to impose punishment: **Cth [14]**, **NSW [27]**, **Qld**

⁹ *EGH19* [2026] HCA 7 at [314] (Jagot J). See also at [24]-[27] (Gageler CJ and Gleeson J), [127]-[128] (Gordon J), [289], [329]-[330] (Jagot J), and at [237] (Steward J), explaining *Benbrika No 1* (2023) 280 CLR 1.

¹⁰ See *Jones* (2023) 280 CLR 62 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

¹¹ *Garlett* (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ) (emphasis added).

[24], SA [25]. It is uncontroversial that State law may authorise a body other than a “court” to exercise judicial power. But it is not necessarily a corollary of that proposition that a State law may authorise a body other than a “court” to impose punishment.¹²

- 10 Several interveners accept that the *Lim* question can at least be relevant to whether the “institutional integrity” limit is contravened: **Cth [19], Vic [12], WA [16]**. But what determines whether the *Lim* question should be asked in a particular case, particularly if what is involved is the conferral of a detention power? Why should it not be asked in this case where, in one way or other, numerous of the opposing parties rely on the historical exception identified in *Lim*? It is not possible to interrogate whether the present power fits within the recognised “exceptional case” without engaging with the *Lim* question: cf **DS [37], Vic [37]**. Whether the law can be described as “ancillary” or “incidental” also necessitates such an analysis of means and ends: **PS [21] n 71; cf DS [66], Vic [37]**.
- 11 **Justification.** The Territory’s case on justification rests on the availability purpose justifying *any* pre-trial detention, by virtue only of the existence of pending charges: **DS [59], [61], [65], Vic [52]**. If that is correct, there would be no impediment to legislation abolishing the power of the courts to grant bail entirely: **DS [16]**, cf **Cth [38]**. But the “supervisory jurisdiction of the courts” to grant bail was important to the explanation of the exception in *Lim*.¹³ That inherent jurisdiction is important as a matter of history, and ensures that detention on remand does not continue beyond what can be justified as necessary to enable vindication of judicial power, in the circumstances of an individual. The “distinguishing status” of an accused person, informed by history and principle, is accordingly distinguishable from the “vulnerability” of aliens to detention to effect exclusion or removal.¹⁴
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- 12 NAAJA does not contend that pre-trial detention may be justified *only* by the availability purpose, nor that the likelihood of appearance for trial is the *only* permissible consideration: **PS [21]**, cf **Tas [14], Qld [6], DS [63]-[64]**. Other matters may be relevant to the purpose of enabling the vindication of judicial power in determining the charged offences, a clear example being a risk of interference with witnesses or evidence. It is less clear that preventing the commission of offences on bail is of that nature (cf **Cth [33]-[34], Vic [27]**),
- 30 in view of the presumption of innocence, and given that “stopping criminal behaviour” is

¹² See *Totani* (2010) 242 CLR 1 at [146]-[147] (Gummow J), see also at [79] (French CJ).

¹³ *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ). See also *Attorney-General of Trinidad and Tobago v Charles (No 2)* [2022] UKPC 31 at [78], [85].

¹⁴ Cf **DS [61], [68]**; *YBFZ* (2024) 99 ALJR 1 at [10] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

traditionally pursued by punishment following adjudgment of guilt.¹⁵ To the extent that more specific purpose is capable of connection to the higher level purpose of enabling the vindication of judicial power, it must be because those matters are brought into the traditional evaluative assessment of whether bail should be granted: see **NSW [36]-[41]**.¹⁶ A consideration of preventing offending within that familiar assessment — and even community safety being treated as the paramount consideration in that assessment (ss 7A(2), (2AA), 24) — may (albeit problematically) remain consistent with the ultimate character of that evaluation being directed to enabling the vindication of judicial power by determination of the charges.

10 13 Perhaps recognising this, the Territory does not attempt to justify s 7A(2AB) by reference to “protection of the community” alone, rather asserting that it “is not an impermissible purpose to pursue *in combination with others*”: **DS [64]**. But that is not what the provision does. Section 7A(2AB) is deliberately different, imposing a distinct further “step”: **DS [50], PS [31]-[32]**. Its concern is *only* with preventive detention. Even if a risk of offending were relevant to a risk of non-appearance (**DS [63]**), that does not help connect the purpose of s 7A(2AB) to the availability purpose, because the attendance question is expressly excluded from the evaluation. The ability to make repeat applications for bail (**DS [67]**) is of no moment when the criterion in s 7A(2AB) operates each time. Nor does the availability of habeas corpus assist (**DS [17], [71]**); an application for the writ could only supervise compliance with s 7A(2AB).¹⁷

14 Even if a purpose of protecting the community can be characterised as addressed to the “overarching purpose” of enabling the vindication of judicial power (**Cth [34]**), s 7A(2AB) is not reasonably capable of being seen as necessary for that purpose. The Commonwealth properly attempts no justification on that point: **Cth [47]**, see **PS [40]-[44]**.

Dated: 13 August 2026



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¹⁵ See *EGH19* [2026] HCA 7 at [167]-[168] (Edelman J), [233] (Steward J).

¹⁶ See, by analogy, *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473 (Mason CJ, Brennan, Dawson and Toohey JJ), drawing a distinction between an extension of a sentence “merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible”.

¹⁷ The Territory does not suggest its historical function as a means of seeking bail is maintained (see **Tas [7]**), and common law powers to grant bail are abolished (s 49).