



HIGH COURT OF AUSTRALIA

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Details of Filing

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

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED
First Plaintiff

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Xavier Mardinga
Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

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SUPPLEMENTARY SUBMISSIONS OF THE DEFENDANT

PART I — CERTIFICATION

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

PART II — SUPPLEMENTARY SUBMISSIONS ON CTH [40]-[44]

2. The focus of this case, until the Commonwealth’s intervention on 6 August 2026, was s 7A(2AB) of the *Bail Act*, inserted by the 2025 Amending Act. CS[40]-[45] have added a new constitutional challenge, since adopted by NAAJA in reply, impugning as “invalid” various sub-paragraphs of s 7A(1) which predate the 2025 Amending Act and which refer to certain Commonwealth offences: s 7A(1)(d), (da) and (f) (read with ss 3A(1) and 3(1)).

3. The Commonwealth’s argument has the following steps. **(1)** It is beyond the legislative capacity of a State to “confer jurisdiction on State courts to hear and determine” proceedings against an accused charged with a Commonwealth offence “or otherwise to regulate the exercise of federal jurisdiction”, and it is “[l]ikewise, in respect of the legislative capacity of the Territory” because there is “no Commonwealth law enacted pursuant to s 122 of the Constitution conferring on Territory legislatures power to regulate the exercise of federal jurisdiction”: CS[40]. **(2)** That restriction renders “invalid” a State or Territory provision that “attempt[s] to regulate the exercise of federal jurisdiction” and leaves nothing left to be picked up by s 68(1) of the *Judiciary Act*: CS[42]. **(3)** Section 7A(1)(d), (da) and (f) each purports “directly, and of its own force” to “regulate the grant or refusal of bail in respect of persons accused of Commonwealth offences” and is “invalid” as “an attempt to regulate the exercise of federal jurisdiction”: CS[42]-[43].

4. The argument can be rejected at step 1 (Section A below). If necessary to go further, the Court would find steps 2 and 3 involve overstatement and error also (Section B below).

A. STEP 1: TERRITORY POWER TO REGULATE FEDERAL JURISDICTION

5. The Commonwealth’s new argument is premised on an assimilation of the position of the Territory to the position of the States, which is only briefly developed at CS[40]. It is anchored by CS[40], note 110, to the decision in *Rizeq* (which was only about State law)¹ and cases which have followed it. *Rizeq* referred to “a more general incapacity of any law enacted other than by the Parliament of the Commonwealth to affect the exercise of federal jurisdiction by any court”.² Read in context, the focus there on the Commonwealth Parliament should only be understood in contradistinction to the States. It is not to be

¹ (2017) 262 CLR 1 at at [114] (Edelman J) [60]-[61], [103].

² (2017) 262 CLR 1 at [57] (Bell, Gageler, Keane, Nettle and Gordon JJ).

supposed that the Commonwealth lacks legislative power to empower the Northern Territory to regulate federal jurisdiction in the exercise of the Territory's independent power conferred upon it by the Commonwealth.³ The last sentence of CS[40] appears to accept this.

6. The first step in the Commonwealth's argument is wrong because, whatever the merits of the Commonwealth's argument with respect to State legislative power, s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) (**Self-Government Act**) is a law enacted pursuant to s 122 of the Constitution conferring on the Northern Territory legislature power to regulate the exercise of federal jurisdiction. Section 6 provides that "[s]ubject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory". The words "peace, order and good government" are familiar. "[A] power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself"; these "are not words of limitation".⁴ "[E]ven a remote and general connection between the subject-matter of the legislation and the [Territory] will suffice".⁵
7. Whether and when a person in the Territory can be at conditional liberty when arrested in the Territory and/or brought before a Territory court after being charged with an offence against Commonwealth law has an obvious connection with the Territory. Section 6 of the Self-Government Act thus supports the enactment of the impugned provisions in s 7A(1).
8. The following points further support this interpretation and application of s 6. *First*, the established breadth of the words "peace, order and good government" presents a serious obstacle to any implied limit in s 6. The power "to make laws for the peace, order and good government of the Territory" is "of the same 'plenary' nature as that vested in the Commonwealth Parliament itself":⁶ see also [5]-[6] above.
9. *Second*, the Commonwealth Parliament expressly dealt with limitations on the Territory's legislative power under s 6 by conferring that power "[s]ubject to this Act". Nothing in the Self-Government Act limits the Northern Territory Parliament from regulating the

³ An exercise of power by the Territory legislature after self-government is independent of and separate from the Commonwealth. See, eg, *Vunilagi v The Queen* (2023) 279 CLR 259 at [57]-[58].

⁴ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10. See also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [46] (Gaudron, Gummow and Hayne JJ).

⁵ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14; *Pearce v Florenca* (1976) 135 CLR 507 at 518; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 372; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [48].

⁶ *Vunilagi v The Queen* (2023) 279 CLR 259 at [66] (Gageler J).

exercise of federal jurisdiction if doing so otherwise has a sufficient connection to the Territory. Section 6 cannot be construed as if the Commonwealth Parliament intended to confer an ambulatory legislative power tethered to the precise parameters of State legislative power. Any assumption of assimilation is precluded by s 50(1) which limits the legislative power of the Northern Territory in a way that State legislatures are not limited.

10. *Third*, any deficiency of State legislative power⁷ to regulate federal jurisdiction does not justify reading down s 6 – a law of the Commonwealth. There is no asserted deficiency of Commonwealth legislative power to regulate federal jurisdiction. Section 122 of the Constitution is “as large and universal a power of legislation as can be granted”.⁸

10 11. *Fourth*, it is not necessary to read down s 6 to protect the integrity of federal jurisdiction. No Territory law could have inconsistent operation with any federal law regulating that federal jurisdiction⁹ and it would be open to the Commonwealth Parliament to enact a law that excludes, or preserves, the operation of Territory law.¹⁰

12. *Fifth*, prior to self-government, ordinances in the Northern Territory had the status of Commonwealth laws.¹¹ There could have been no doubt as to their capacity to regulate the exercise of federal jurisdiction. Ordinances were made that did just that, including specifically about federal offences.¹² Section 6 of the Self-Government Act was not intended to be any narrower than the pre-existing power to make ordinances.¹³

B. STEPS 2 AND 3: THE PROVISIONS ARE NOT “INVALID”

20 13. CS[42] identifies from *Rizeq* that “State or Territory legislation cannot directly, and of its own force, regulate the grant or refusal of bail in respect of persons accused of Commonwealth offences”. CS[42]-[43] assume that the only possible interpretation of the impugned provisions is that they are laws of this kind. The assumption is not correct.

14. “The incapacity of a State law to affect the exercise of federal jurisdiction by a State court”¹⁴ means States cannot make laws applying of their own force in federal jurisdiction

⁷ See generally *Rizeq v Western Australia* (2017) 262 CLR 1 at [60]-[61], [103].

⁸ *Government of the Russian Federation v Commonwealth* (2026) 99 ALJR 1562 at [23].

⁹ See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428.

¹⁰ See, eg, *Crimes Act 1914* (Cth) ss 15AA(4), 15AAA(8), 15AB(4).

¹¹ *Kruger v Commonwealth* (1997) 190 CLR 1 at 49-50 (Dawson J), 74 (Toohey J); *Northern Territory (Administration) Act 1910* (Cth) s 13(1).

¹² *Criminal Procedure Ordinance 1933* s 3; *Justices Ordinance 1928-1957* s 200; *Supreme Court Ordinance 1911-1954* ss 21-21G.

¹³ Notes on Clauses, Northern Territory (Self-Government) Bill 1978 (Cth) at 1.

¹⁴ *Rizeq v Western Australia* (2017) 262 CLR 1 at [58].

so as to “command a court as to the manner of exercise of federal jurisdiction”.¹⁵ Assuming (contrary to Section A above) the Territory to be affected by this same incapacity, the provisions of the *Bail Act* must be read down, if possible, so as not to exceed power. That can be done by interpreting the impugned parts of s 7A(1) as applying the requirements of s 7A to bail decisions in respect of persons accused of the nominated Commonwealth offences if and only if the Commonwealth legislature directs, by the operation of federal law, to pick them up. They are thus within the compass of s 68(1) of the *Judiciary Act* which, unlike s 68(2), does not limit the reference to State or Territory laws respecting “offenders” or “offences” to “offenders or persons charged with offences against the laws of the State or Territory”: *cf* [4] of the Commonwealth’s s 78B notice.

15. This approach is supported by the following. *First*, there is no reason why a State or Territory cannot make a law that has contingent operation only, and no reason why the contingency cannot be some legislative act of a different polity.
16. *Second*, s 59 of the *Interpretation Act 1978* (NT) requires courts to read and construe Territory legislation so as not to exceed the legislative power of the Legislative Assembly conferred by s 6 of the Self-Government Act. The above does just that.
17. *Third*, the Commonwealth’s argument elevates form over substance because generally expressed State and Territory laws can be picked up (for example, a law that says that people charged with terrorism offences are subject to stricter bail laws) but not State and Territory laws expressed with greater specificity and thus clarity (for example, a law that says that people charged with an offence under Part 5.3 of the *Criminal Code* (Cth) are subject to stricter bail laws). The Commonwealth argument means States and Territories can do indirectly what they cannot do directly.
18. *Fourth*, States have a legitimate constitutional interest in matters affecting the detention of persons in their prisons by reason of s 120 of the Constitution. The ability to obtain bail has a direct impact on the number and class of persons who may be detained in a State prison, which will, in turn, affect a State’s management of its prisons. This constitutional context makes it even less likely that States (and Territories assuming them to be assimilated) cannot make a contingent law about bail respecting federal offences.

¹⁵ *Rizeq v Western Australia* (2017) 262 CLR 1 at [61]; *Pedersen v Young* (1964) 110 CLR 162 at 167; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87, 93; *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 at [230].

19. **“Invalid” in all operations?** CS[43] contends that insofar as, by s 7A(1)(d), (da) and (f), “s 7A is said to apply to [specific Commonwealth] offences”, “those operations of s 7A are invalid”. It appears the Commonwealth’s position is that the relevant sub-paragraphs of s 7A have no valid operation. However, s 7A is relevant when considering police bail (s 16). It also applies, by s 114 of the *Local Court (Criminal Procedure) Act 1928* (NT), where a Local Court Judge adjourns a committal hearing and considers whether to grant or refuse bail during such an adjournment. This Court has held that committal functions are administrative functions.¹⁶ The Commonwealth has not established that Ch III limits State legislative power to authorise the police to arrest and grant or refuse bail to persons charged with federal offences, nor has it exposed its position as to whether the decision of a court to grant or refuse bail is always an exercise of judicial power (and whether it matters to its *Rizeq* argument). To the extent it is necessary for the Court to decide these issues, the Territory’s position is that the *Rizeq* principle at least does not apply to the conferral by State or Territory legislatures of police powers to arrest, detain pending trial and grant or refuse bail to persons accused of Commonwealth offences. That is sufficient to defeat the contention at CS[42]-[43] of wholesale invalidity.

20. **The *Rizeq* principle may be subject to relevant qualifications.** Section 120 of the Constitution is about, at least, the detention of federal offenders in State prisons.¹⁷ The words “detention” and “punishment” may also include the incidences of detention, including the circumstances in which it may be ameliorated by a grant of bail.¹⁸ If so, s 120 authorises States making bail laws respecting federal offenders and those charged with federal offences, subject no doubt to s 109. Any general incapacity of the States to regulate the exercise of federal jurisdiction must therefore be qualified by that which s 120 permits.

21. **Severance.** If the submissions above are all rejected, then s 7A(1)(d), (da) and (f) (read with s 3A(1)) of the *Bail Act* can be severed. This appears to be common ground: CS[45].

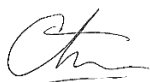
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¹⁶ See *Grassby v The Queen* (1989) 168 CLR 1.

¹⁷ See, eg, *Leeth v Commonwealth* (1992) 174 CLR 455 at 466-467, 477, 479.

¹⁸ See the Commonwealth’s similar argument in *Leeth v Commonwealth* (1992) 174 CLR 455 at 459-460.