



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

NORTHERN AUSTRALIA ABORIGINAL JUSTICE AGENCY LTD

First Plaintiff

XAVIER MARDINGA

Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

**SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
AUSTRALIAN CAPITAL TERRITORY (INTERVENING)**

PART I — CERTIFICATION

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

PARTS II & III — INTERVENTION

2. The Attorney-General of the Australian Capital Territory (ACT) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Northern Territory, and in response to the submissions of the Attorney-General of the Commonwealth (CS).

PART IV — ARGUMENT

A. SUMMARY

3. CS [40]-[44] concerns the application of s 68(1) of the *Judiciary Act* to State or Territory laws which refer to Commonwealth offences expressly rather than descriptively. The Court should not determine that issue unless it is necessary to dispose of the proceedings. If the question of invalidity by reason of Chapter III is resolved in favour of the plaintiffs, there is no need to determine the issue raised by the Commonwealth. In that event, and for prudential reasons, the Court should not consider an issue which may have significant implications for the basis on which federal criminal jurisdiction in the territories has long been administered.

4. If it is necessary to determine the issue, then s 68(1) of the *Judiciary Act* picks up and applies s 7A(2AB) of the *Bail Act 1982* (NT) as a surrogate federal law to all of the Commonwealth offences referred to in s 7A(1), whether those offences are referred to expressly or by general description. That is for two main reasons.

5. *First*, the Commonwealth Parliament has by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) conferred upon the Northern Territory a power to regulate the exercise of federal jurisdiction, which includes a power to enact s 7A(1).

6. *Secondly*, if the *Bail Act 1982* (NT) in the challenged operation was outside the legislative power conferred on the Northern Territory then, as a matter of construction, s 7A(1) in its express application to Commonwealth offences would not purport to regulate the exercise of federal jurisdiction. Rather, it would operate contingently, available to be picked up and applied as a surrogate federal law by a provision such as s 68(1) of the *Judiciary Act*.

B. APPLICATION OF THE BAIL ACT AS A COMMONWEALTH LAW

7. The issue raised at CS [43] does not resolve the plaintiffs' challenge. Applying prudential considerations,¹ the Court should address the issues raised at CS [40]-[44] only if and insofar as the plaintiffs' challenge based on Chapter III does not succeed. The submission at CS [43], if accepted, could have significant implications for the basis on which federal criminal jurisdiction is, and has for some time been, administered in the Territories. Prior to self-government, federal jurisdiction was regulated directly by laws made under s 122, including ordinances that referred expressly to Commonwealth offences.² The statute books of the ACT have subsequently proceeded on the footing that a Territory law may be picked up and applied by s 68(1) of the *Judiciary Act* irrespective of whether it refers to a Commonwealth law expressly or by way of general description.³ The scope of the ACT's criminal laws in turn informs the ambit of a variety of Commonwealth laws made under s 122 which pick up and apply as Commonwealth laws, directly⁴ or indirectly⁵, the criminal laws of the ACT. It follows that the submission at CS [40]-[44] may have significant implications for the past and present administration of federal criminal jurisdiction within and outside the Territories.

8. That historical footing should not be disturbed unless it is necessary to dispose of the proceedings. If the plaintiffs' Chapter III challenge succeeds, the issue raised at CS [43] does not arise. That is because, if s 7A(2AB) is invalid in its direct application by reason of the limits identified in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, it would also be invalid in its operation (if any) as a Commonwealth law. That would follow from the nature of the *Kable* limit as "derivative" of the principle in *Boilermakers*.⁶

¹ *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; [2024] HCA 40 at [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

² See, for e.g., *Children's Services Ordinance 1986* (Cth), s 4(1) (definition of "offence"). For the history of the administration of criminal law in the ACT prior to and upon self-government, see *Vunilagi v The Queen* (2023) 279 CLR 259 at [27]-[35] (Kiefel CJ, Gleeson and Jagot JJ).

³ See the *Bail Act 1992* (ACT), ss 9B(a) (read with Sched 1, Parts 1.5 and 1.6) and (c).

⁴ *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4A (inserted by the *A.C.T. Self-Government (Consequential Provisions) Act 1988* (Cth), s 32).

⁵ See, for e.g.: *Defence Force Discipline Act 1982* (Cth), ss 61(1), (2), read with limb (b) of the definition of "Territory offence" in s 3(1); *Australian Antarctic Territory Act 1954* (Cth), s 6(2); *Heard Island and McDonald Islands Act 1953* (Cth), s 5(2). These schemes for the application, as Commonwealth law, of the criminal laws applicable in the Jervis Bay Territory were relevantly effected by the *Crimes Legislation Amendment Act 1991* (Cth), s 74(1).

⁶ See *Garlett v Western Australia* (2022) 277 CLR 1 at [120] (Gageler J), referring to *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

9. It should further be noted that the issue raised at **CS [43]** does not arise in the case of the second plaintiff, who has been arrested for offences against laws of the Northern Territory, rather than for Commonwealth offences. The only fact in the Special Case (**SC**) that implicates a Commonwealth offence is that the first plaintiff “currently represents” two unnamed individuals charged with offences against ss 474.22(1) and 474.26(1) of the *Criminal Code* (Cth): **SC [42]**. As the Commonwealth accepts, the latter of those provisions is a “serious sexual offence” by reason of s 3A(2)(a) of the *Bail Act 1982* (NT), and is for that reason capable of being picked up and applied by s 68(1) of the *Judiciary Act*: **CS [44]**; **SC [42.2]**. On any view, the only provision to which the submission at **CS [43]** could apply is s 474.22(1) of the *Criminal Code* (Cth), which falls within s 7A(1)(f) on the basis that it is a “Commonwealth sexual offence” within the meaning of s 3(1). A challenge to the validity of s 7A(1)(f) in that particular operation “would not take the plaintiffs the whole of the distance they need to travel”⁷ in order to obtain the answers they seek to Questions 3 and 4 of the Special Case (see **PS [46]**).

10. **Section 7A(2AB) applies with respect to all Commonwealth offences referred to in s 7A(1).** If and insofar as it is necessary to address **CS [43]**, s 7A(2AB) applies with respect to all Commonwealth offences referred to in s 7A(1), whether expressly or by general description.

11. *First*, the premise of the Commonwealth’s submission is that 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]**. That premise is incorrect. The position in the Northern Territory is addressed at **NT Supp [5]-[12]**. The Legislative Assembly is empowered “to make laws for the peace, order and good government of the Territory”.⁸ It is well-established that a legislative power conferred in those terms is plenary, within the limits of the grant.⁹ The Commonwealth has not identified any reason to read this down to exclude a power to regulate federal jurisdiction. The power having been conferred by Commonwealth legislation, the issue raised at **CS [40]** by reference to *Rizeq*¹⁰ does not arise.

12. At the very least, the submission at **CS [40]** is overbroad because it does not account

⁷ *NAAJA v Northern Territory of Australia* (2015) 256 CLR 569 at [114] (Gageler J).

⁸ *Northern Territory (Self-Government) Act 1978* (Cth), s 6.

⁹ *Duncan v New South Wales* (2015) 255 CLR 388 at [36]-[37] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ), citing *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

¹⁰ *Rizeq v Western Australia* (2017) 262 CLR 1. As observed at **NT Supp [14]**, the incapacity in *Rizeq* was expressed by reference to State laws.

for differences between the Northern Territory and the ACT. Section 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) confers on the Legislative Assembly of the ACT a power to make laws for the peace, order and good government of the Territory, including with respect to the exercise of powers by the Executive (and subject to Parts IV and VA of the Act). The limits on that grant of legislative power are expressly enumerated in s 23, which has been amended on multiple occasions.¹¹ Further, any inconsistency with a Commonwealth law is accounted for and avoided by s 28 of the *Self-Government Act*. Having regard to that statutory context, there is no warrant for implying into s 22 a further limitation to exclude laws which purport to regulate the exercise of federal jurisdiction.

13. The position in the ACT is further distinguished by s 48A of the *Self-Government Act*. Section 48A specifically contemplates that the Legislative Assembly may supplement the jurisdiction of the Supreme Court of the ACT. As well as “all original and appellate jurisdiction that is necessary for the administration of justice in the Territory” (s 48A(1)), the Supreme Court “may have such further jurisdiction as is conferred on it by any Act, enactment, or Ordinance” (s 48A(2)). An enactment, in this context, includes a law of the Legislative Assembly.¹² The Legislative Assembly has in fact exercised that legislative power by enacting the *Bail Act 1992* (ACT). In its application to Commonwealth offences, the *Bail Act 1992* (ACT) applies as a law of the Territory rather than as a Commonwealth law, it being a law made in the exercise of a legislative power conferred under s 122.¹³

14. Secondly, if s 7A of the *Bail Act 1982* (NT) does not apply of its own force with respect to Commonwealth offences, then it operates as a “surrogate federal law”.¹⁴ Contrary to CS [43], a Territory law which, if read literally, would impermissibly purport to regulate the exercise of federal criminal jurisdiction is not invalid. Rather, it should be construed as having been intended to operate contingently. If there is no Commonwealth law capable of picking up and applying the Territory law, it will have no operation. If, however, there is a Commonwealth law which is directed to a provision of that kind, the law is available to be picked up and to operate as a Commonwealth law with respect to the identified Commonwealth offence.¹⁵

¹¹ For e.g., by the *Euthanasia Laws Act 1997* (Cth), s 3 and Sched 2, and subsequently by the *Restoring Territory Rights Act 2022* (Cth), s 3 and Sched 1, item 1.

¹² The law may be either made by the Legislative Assembly under the *Self-Government Act* or taken to be an enactment under s 34: *Self-Government Act*, s 3(1) (definition of “enactment”).

¹³ *Vunilagi* at [56]-[57] (Kiefel CJ, Gleeson and Jagot JJ), [104], [113] (Gordon and Steward JJ).

¹⁴ *Mok v Director of Public Prosecutions (NSW)* (2016) 257 CLR 402 at [84] and fn 108 (Gordon J).

¹⁵ See, for e.g., *Judiciary Act*, s 68(1) and *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4A.

15. This construction of s 7A gives effect to the statutory directive that a law of the Northern Territory should be interpreted as operating to the full extent of, but so as not to exceed, the power of the legislature.¹⁶ It also avoids the unstable distinction between Territory laws which “identify offences by general description” and those which “expressly identif[y]... Commonwealth offences”: cf CS [43]-[44]. That distinction is a triumph of form over substance.¹⁷ It would mean that s 68(1) of the *Judiciary Act* is incapable of operating with respect to any State or Territory laws that identify Commonwealth offences by name.

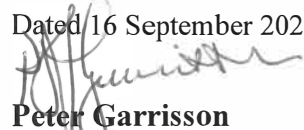
16. There is nothing to indicate that s 68(1) was intended to have so limited an operation. To the contrary, accommodating a range of State and Territory legislative designs advances the manifest object of achieving, within each State or Territory, “uniformity... as to the procedure for dealing with State [or Territory] and federal offences”.¹⁸ That scheme necessarily accommodates a degree of flexibility in its application, as is reflected in the “degree of translation” permitted in applying the text of State and Territory laws, as Commonwealth laws, to Commonwealth offences.¹⁹ This distinctive operation of s 68(1), against the background of which s 7A of the *Bail Act 1982* (NT) was enacted, means that limited assistance is gained from an analogy to laws which are invalid by reason of s 109 of the Constitution.²⁰

17. For those reasons, if it is necessary to decide whether s 7A(2AB) is capable of being picked up and applied by s 68(1) of the *Judiciary Act* to an offence against s 474.22(1) of the *Criminal Code* (Cth), the answer to that question is “Yes”.

PART V — ESTIMATE OF TIME

18. It is estimated that up to 15 minutes will be required to present the ACT’s oral argument.

Dated 16 September 2026



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¹⁶ *Interpretation Act 1978* (NT), s 59. See also s 120(1) of the *Legislation Act 2001* (ACT).

¹⁷ See, by analogy, the principle that constitutional prohibitions cannot ordinarily be avoided by doing indirectly what cannot be done directly: *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at [29] (Gleeson CJ); *Wragg v New South Wales* (1953) 88 CLR 353 at 387-388 (Dixon CJ).

¹⁸ *R v Gee* (2003) 212 CLR 230 at [7] (Gleeson CJ). See also *Williams v The King* (1933) 50 CLR 536 at 545 (Dixon J); *Williams v The King (No 2)* (1934) 50 CLR 551 at 560 (Dixon J); and *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at [60] (Kiefel CJ, Gageler and Gleeson JJ), [236] (Edelman J).

¹⁹ *Huynh* at [57], [59]-[64] (Kiefel CJ, Gageler and Gleeson JJ).

²⁰ Cf *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [61] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), cited at CS [42], fn 115.

**ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
AUSTRALIAN CAPITAL TERRITORY (INTERVENING)**

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	Commonwealth Constitution	Current	s 122	Currently in force	All relevant times
<i>Commonwealth statutes and ordinances</i>					
2.	<i>Australian Antarctic Territory Act 1954 (Cth)</i>	Current	s 6	For illustrative purposes only	N/A
3.	<i>Australian Capital Territory (Self-Government) Act 1988 (Cth)</i>	Current	ss 3, 22, 23, 28, 34, 48A	Currently in force	All relevant times
4.	<i>Children's Services Ordinance 1986</i>	As enacted	s 4(1)	For illustrative purposes only	N/A
5.	<i>Crimes Legislation Amendment Act 1991 (Cth)</i>	As enacted	s 74 and Sched 2, Part 1	For illustrative purposes only	N/A
6.	<i>Criminal Code (Cth)</i>	Current	ss 474.22, 474.26	Currently in force	All relevant times
7.	<i>Defence Force Discipline Act 1982 (Cth)</i>	Current	ss 3, 61	For illustrative purposes only	N/A
8.	<i>Euthanasia Laws Act 1997 (Cth)</i>	Current	s 3 and Sched 2	For illustrative purposes only	N/A
9.	<i>Heard Island and McDonald Islands Act 1953 (Cth)</i>	Current	s 5	For illustrative purposes only	N/A
10.	<i>Jervis Bay Territory Acceptance Act 1915 (Cth)</i>	Current	s 4A	For illustrative purposes only	N/A
11.	<i>Judiciary Act 1903 (Cth)</i>	Current	s 68	Currently in force	All relevant times
12.	<i>Northern Territory (Self-Government) Act 1978 (Cth)</i>	Current	s 6	Currently in force	All relevant times
13.	<i>Restoring Territory Rights Act 2022 (Cth)</i>	Current	s 3 and Sched 1, item 1	For illustrative purposes only	N/A
<i>Territory statutes</i>					
14.	<i>Bail Act 1982 (NT)</i>	Current	ss 3A, 7A	Currently in force	All relevant times
15.	<i>Bail Act 1992 (ACT)</i>	Current	s 9B, and Sched 1,	Currently in force	All relevant times

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
			Parts 1.5 and 1.6		
16.	<i>Interpretation Act 1978 (NT)</i>	Current	s 59	For illustrative purposes only	N/A
17.	<i>Legislation Act 2001 (ACT)</i>	Current	s 120	For illustrative purposes only	N/A