



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

XAVIER MARDINGA
Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

**SUPPLEMENTARY SUBMISSIONS OF THE ATTORNEY GENERAL
FOR NEW SOUTH WALES (INTERVENING)**

10

PART I CERTIFICATION

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

PART II ARGUMENT

2. The NSWAG advances these supplementary submissions¹ in response to the argument advanced at [40]-[44] of the submissions of the Attorney-General of the Commonwealth (Intervening) (**Cth AG**) filed on 6 August 2026 (**CS**). In those paragraphs the Cth AG contends that, because s 7A(1)(d)-(da) and s 7A(1)(f) of the NT Bail Act refer to and purport to apply s 7A to certain Commonwealth offences, and in doing so purportedly regulate the exercise of federal jurisdiction, those operations of s 7A(1) are invalid and incapable of being picked up by s 68(1) of the *Judiciary Act 1903* (Cth).
3. The issues raised by the Cth AG's argument are significant and her argument has major potential ramifications for many State and Territory laws relevant to criminal and civil procedure that refer specifically to Commonwealth statutory provisions and have hitherto been assumed to operate in federal jurisdiction by virtue of ss 68 or 79 of the *Judiciary Act*. As the supplementary submissions of the Northern Territory filed on 9 September 2026 (**DSS**) explain at [17], it would give rise to practical inconvenience if s 68(1) of the *Judiciary Act* were held to pick up only generally expressed State and Territory laws to the exclusion of laws framed with greater specificity and thus clarity.
4. These considerations mean that the "prudential approach"² to the determination of constitutional issues has particular salience in this case. For these reasons, the additional argument advanced by the Cth AG should only be determined if and to the extent that it properly arises. For example, if it were accepted that the Northern Territory can regulate the exercise of federal jurisdiction by reason of the plenary nature of the power conferred by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) (see **DSS [5]-[12]**) no occasion arises to consider: (i) whether a State could enact a law in the form of s 7A(1)(d), (da) and (f) of the NT Bail Act; (ii) whether such a law would be invalid; and (iii) whether such a law would be given effect as a surrogate federal law by s 68(1) of the *Judiciary Act*.
5. In the event that the Court concludes that the Northern Territory – like the States – does not have power to make laws applying of their own force in federal jurisdiction so as to

¹ Defined terms used in the NSWAG's submissions filed on 6 August 2026 are adopted for the purposes of these supplementary submissions.

² See the authorities cited at **CS [5]**.

“regulate”, “govern” or “command a court as to the manner of” the exercise of federal jurisdiction (such that it is necessary to consider steps 2 and 3 of the Northern Territory’s submissions),³ the Cth AG’s argument should still be rejected for the following reasons.

6. **First**, the restrictions on the availability of bail imposed by s 7A apply where an “authorised member” (being a police officer) or a court is determining whether to grant bail: see **DSS [19]**. Clearly, when exercised by a police officer, the function of determining whether bail should be granted is administrative in character (and could not involve the exercise of federal jurisdiction). There may also be circumstances in which the grant of bail by a court is characterised as administrative.⁴ Accordingly, there is no reason why a State or Territory cannot enact a law that: (i) of its own force permits (at least) police officers to grant bail for Commonwealth offences; and (ii) regulates, by way of provisions like s 7A(1)(d)-(da) and s 7A(1)(f), the criteria that are to be applied by police officers when determining bail applications for persons accused of those offences. To that extent, the alleged limitation on the legislative power of the Territory identified at **CS [40]** is simply not engaged. It follows that there is at least some scope for s 7A(1)(d)-(da) and s 7A(1)(f) of the NT Bail Act to operate of their own force as Territory laws.
7. **Secondly**, even insofar as s 7AB does purport to regulate the exercise of federal jurisdiction, the consequence is that the Territory Parliament could not enact such a law to apply of its own force. The law would be inoperative to that extent. But that does not mean that it could not be picked up and applied by s 68(1) of the *Judiciary Act*: contra **CS [42]**.
8. Although legislation that is made in excess of power is sometimes referred to as “invalid” or “inoperative”,⁵ that does not gainsay the possibility that a polity may enact a law that:
 - (a) has a contingent operation only (including where the contingency is an action taken by a different polity⁶) (see **DSS [15]** and [16] below); or

³ *Rizeq v Western Australia* (2017) 262 CLR 1 at [59], [61], [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

⁴ In this regard, it is notable that the function of determining bail applications has been held to be administrative in character even if exercised by a magistrate: see eg *Ex parte Cousens*; *Re Blacket* (1946) 47 SR (NSW) 145 at 146-147 (Jordan CJ, speaking for the Full Court); *Grassby v the Queen* (1989) 168 CLR 1 at 15 (Dawson J, with whom Mason CJ, Brennan, Deane, and Toohey JJ agreed); *Narain v Parnell* (1986) 9 FCR 479 at 483 (Burchett J); *Ex parte Veltmeyer* [1989] 1 Qd R 462 at 466 (Macrossan J).

⁵ cf *Abdel-Hady v Commonwealth of Australia* (2026) 100 ALJR 742 at [3] (Gageler CJ, Gleeson and Beech-Jones JJ), citing *Haskins v The Commonwealth* (2011) 244 CLR 22 at [45] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *South Australia v The Commonwealth* (1942) 65 CLR 373 at 408 (Latham CJ); and *New South Wales v Kable* (2013) 252 CLR 118 at [51] (Gageler J).

⁶ See, eg, *Nauru (High Court Appeals) Act 1976* (Cth), s 2.

(b) can only operate by force of the legislative power of the polity for some of its operations (i.e. a law that has been “read down” or “partially disapplied”).

9. There is no conceptual problem with laws of these kinds being picked up as surrogate federal laws. Indeed, even a statutory provision that has no valid operation continues to have an existence as a body of text capable of being referred to and adopted by a federal law (subject to the limitation identified at [13] below).
10. An example of the category of law described at [8(b)] above is a generally expressed State law relating to civil or criminal procedure that in terms could operate in both federal and State jurisdiction but is read down so as only to apply of its own force in State jurisdiction, with its operation in federal jurisdiction being achieved through the application of s 68 or s 79 of the *Judiciary Act*. The Cth AG appears to accept that such a generally expressed law could apply in federal jurisdiction. But there is no reason why s 68 (or s 79) should be able to pick up the invalid operation of such a generally expressed law, but not an invalid law specifically expressed to apply in federal jurisdiction.
11. The critical point is that s 68 (albeit to a lesser degree than s 79) is intended to have a “gap-filling” function.⁷ While its overarching purpose is to ensure that “federal criminal law is administered in each State [and Territory] upon the same footing as State [and Territory] law and [to avoid] the establishment of two independent systems of justice”, it also serves the purpose of overcoming the “gap” created by the lack of State and Territory power to pass laws regulating or governing the exercise of federal jurisdiction.⁸ That lacuna in State and Territory legislative power does not defeat the operation of s 68(1); rather, it is one of the issues to which s 68(1) is addressed. In other words, properly construed, s 68(1) picks up and facilitates the application of State and Territory laws of the kind described at [7]-[10] above, which could not apply of their own force in federal jurisdiction for some or all of their operations because of that lacuna. That was the implicit premise in *Huynh*: while the relevant State law could not apply of its own force in federal jurisdiction (in part because of an absence of legislative power⁹), s 68(1) was capable of overcoming that problem: the real issue was whether s 68(1), properly construed, applied to the law in question and whether the law could be picked up only in part without altering its meaning.

⁷ *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at [42] (Kiefel CJ, Gageler and Gleeson JJ).

⁸ *Huynh* (2023) 280 CLR 341 at [42] (Kiefel CJ, Gageler and Gleeson JJ).

⁹ *Huynh* (2023) 280 CLR 341 at [37] (Kiefel CJ, Gageler and Gleeson JJ).

12. Whether or not s 68(1) serves that function cannot depend upon whether the State or Territory law in question is expressed generally to apply to a range of offences which include Commonwealth offences, or expressed specifically to apply to Commonwealth offences. As the Northern Territory submits (and as foreshadowed at [10] above), that would be to prioritise form over substance: **DSS [17]**.
13. Of course, s 68(1) cannot pick up a State or Territory law if to do so would be inconsistent with other Commonwealth laws or would contravene a constitutional limitation on Commonwealth legislative power.¹⁰ Such a qualification is explicit in s 79, but has been found to be implicit in s 68(1).¹¹ However there is no suggestion by the Cth AG of that qualification being applicable here.
14. **Thirdly**, in support of the proposition that “an invalid State or Territory law supplies nothing to be picked by the operation of s 68(1)” of the *Judiciary Act*, the Cth AG relies on the judgment of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [61]. However, *Agtrack* does not support such a broad proposition.
15. The point made in *Agtrack* at [61] concerned the proper construction of s 79 of the *Judiciary Act* as it relates to s 109 of the Constitution. Their Honours were there observing that where a State law is inconsistent with some other Commonwealth statute – such that it has been rendered inoperative by s 109 of the Constitution – “there would be no subject matter to be picked up by the operation of s 79”. Their Honours reasoned, in effect, that s 79 of the *Judiciary Act* does not operate so as to revive the State law in federal jurisdiction. However, that reasoning does not address the different question whether the lacuna in State and Territory legislative power identified above is overcome by s 79 (which it clearly is, in light of *Rizeq*) or indeed by s 68(1). In any event, the observations in *Agtrack* relating to s 109 have been overtaken by the analysis in *Rizeq* at [92]. Since the operation of s 79 has now been found to be confined to “an area in which there is an absence of State legislative power”,

¹⁰ *Huynh* (2023) 280 CLR 341 at [58] (Kiefel CJ, Gageler and Gleeson JJ), [149] (Gordon and Steward JJ), citing *Putland v The Queen* (2004) 218 CLR 174 at 179 [7], 189 [41], 215 [121]. The limits on Commonwealth legislative power explains the reasoning in *Kable v New South Wales* (2012) 268 FLR 1 at [152] (Basten JA), which is relied on at **CS [42]**: the invalid State law could not be picked up and applied via s 79 because the Commonwealth Parliament also could not pass a law that conferred a non-judicial power on the State Supreme Court in the exercise of federal jurisdiction.

¹¹ See *R v McGregor* (2026) 100 ALJR 287 at [17] (Gageler CJ, Gleeson and Beech-Jones JJ), [66] (Gordon and Steward JJ).

within that field of operation “State laws have no valid application and s 109 of the *Constitution* for that reason simply has no operation”.¹²

16. **Fourthly**, other lacunae in State legislative power provide examples in which State laws that are incapable of operating of their own force have been enacted as surrogate federal laws. For example, in *R v Hughes* (2000) 202 CLR 535 this Court considered the interplay between various Western Australian and Commonwealth statutes. In particular, s 31(1) of the *Corporations (Western Australia) Act 1990* (WA) purported to confer certain functions and powers (identified by reference to provisions of Commonwealth Acts) on the Commonwealth DPP and the Cth AG in respect of offences against the *Corporations Law* (WA) (the text of which was itself provided by s 82 of the *Corporations Act 1989* (Cth) (1989 Corporations Act): see s 7 of the *Corporations (Western Australia) Act*). Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ observed (at [31]) that “a State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth”.¹³ However, that difficulty was overcome by ss 46-47 of the 1989 Corporations Act and regulations made under that Act, which provided that Commonwealth officers (including the Cth AG and DPP) had the functions conferred on them by the *Corporations (Western Australia) Act*: see [30]-[33]. The fact that the Western Australian law could not of its own force invest functions in the Cth AG and DPP was no impediment to its provisions being picked up and given effect by federal law.

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¹² *Rizeq* (2017) 262 CLR 1 at [92] (Bell, Gageler, Keane, Nettle and Gordon JJ).

¹³ See, also, *O'Donoghue v Ireland* (2008) 234 CLR 599 at [32] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

- 6 -

ANNEXURE TO INTERVENER'S SUPPLEMENTARY SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Constitution</i> (Cth)	Current	s 109	Currently in force	All relevant times
2.	<i>Judiciary Act 1903</i> (Cth)	Current	ss 68, 79	Currently in force	All relevant times
3.	<i>Northern Territory (Self-Government) Act 1978</i> (Cth)	Current	s 6	Currently in force	All relevant times
4.	<i>Corporations Act 1989</i> (Cth)	In force on 3 May 2000	ss 46, 47, 82	Illustrative purposes	N/A
5.	<i>Nauru (High Court Appeals) Act 1976</i> (Cth)	As made	s 2	Illustrative purposes	N/A
6.	<i>Corporations (Western Australia) Act 1990</i> (WA)	In force on 3 May 2000	ss 7, 31	Illustrative purposes	N/A