



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Sep 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: D15/2025
File Title: North Australian Aboriginal Justice Agency Limited & Anor v
Registry: Darwin
Document filed: Intervener's Supplementary Submissions (A-G of Vic)
Filing party: Interveners
Date filed: 16 Sep 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

Form 27C—Intervener’s submissions

D15/2025

Note: See rule 44.04.4.

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 THE
STATE OF VICTORIA (INTERVENING)**

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes under s 78A of the *Judiciary Act 1903* (Cth).

Part III: Issues and argument

3. These supplementary submissions respond to the Commonwealth's s 78B notice dated 6 August 2026 and its submissions at CS [40]-[44] (adopted by the Plaintiffs at **Reply [2]**) to the effect that, insofar as s 7A(1) of the *Bail Act* expressly identifies certain Commonwealth offences to which s 7A applies, the provision impermissibly purports to "directly" regulate the exercise of federal jurisdiction, and is therefore invalid and incapable of being picked up and applied by s 68(1) of the *Judiciary Act* in the exercise of federal jurisdiction by a Territory court. Insofar as the Commonwealth's submissions are said to apply without differentiation to State as well as Territory legislatures (CS [40]), those submissions should be rejected. Victoria adopts the Defendant's supplementary submissions at **Supp DS [13]-[20]** and adds the following points.

4. *First*, by covering cl 5 of the *Constitution*, laws made by the Commonwealth Parliament are binding on the courts, judges and people of every State. In *MZXOT v Minister for Immigration and Citizenship*,¹ Gleeson CJ, Gummow and Hayne JJ cited with apparent approval the observation of Inglis Clark writing in 1901, prior to the enactment of the *Judiciary Act*, that the effect of covering cl 5 is that "in the absence of any legislation by the Parliament of the Commonwealth which excludes the jurisdiction of the State courts, they will have jurisdiction to declare and apply the laws of the Commonwealth in all cases in which the judicial power of the Commonwealth is not necessarily exclusive of the judicial power of the States". Accordingly, prior to the enactment of the *Judiciary Act* (and the temporary *Punishment of Offences Act 1901* (Cth)), State courts had "State

¹ (2008) 233 CLR 601 at [26], quoting Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 177; see also *South Australia v Totani* (2010) 242 CLR 1 at [65] (French CJ); *Rizeq* (2017) 262 CLR 1 at [6] (Kiefel CJ); *Burns v Corbett* (2018) 265 CLR 304 at [72] (Gageler J), [165]-[167] (Gordon J).

jurisdiction” to determine matters arising under Commonwealth law² and State Parliaments must necessarily have had power to regulate the exercise of such jurisdiction.

5. *Secondly*, State jurisdiction to hear such matters has been displaced, by operation of s 109 of the *Constitution*, as a consequence of the investiture of federal jurisdiction in matters arising under Commonwealth law effected by s 39(2) of the *Judiciary Act*.³ The hearing and determination of such matters by a State court is therefore now necessarily an exercise of federal jurisdiction, and State Parliaments lack legislative power to regulate the exercise of federal jurisdiction.⁴

10 6. *Thirdly*, it follows from that lack of State legislative power that a State law expressed in terms which might otherwise be read as purporting to regulate the exercise of federal jurisdiction by State courts must be construed, if possible in accordance with the relevant interpretative rule,⁵ as being confined to the exercise of State jurisdiction, unless and until it is picked up and applied by a Commonwealth law. As the Commonwealth accepts (CS [44]), there is no difficulty in doing so in relation to a State law expressed in general terms. In *Rizeq*, the general terms of s 114(2) of the *Criminal Procedure Act 2004* (WA) were construed, consistently with s 7 of the *Interpretation Act 1984* (WA), “as applying to a Western Australian court only when exercising Western Australian jurisdiction.”⁶

20 7. The same reasoning may be applied to a State law that refers in terms to specified Commonwealth offences. As the Defendant submits, a State law expressed in such terms can be read as having only a contingent operation: see **Supp DS [14]-[15]**. Alternatively, it can be read down so that it would only apply to State courts when exercising State jurisdiction, unless and until it is picked up and applied by Commonwealth law. It follows from the first point stated above that, so construed, a State Parliament does not

² This appears to have been the basis upon which State courts proceeded. As Nettle J observed in *Burns* (2018) 265 CLR 304 at [134], “until the enactment of s 39(2) of the *Judiciary Act*, State courts and non-court State tribunals continued to adjudicate ss 75 and 76 matters in the exercise of State jurisdiction”. In the Victorian context, see, eg, *Kingston v Gadd* (1901) 27 VLR 417 and *Wollaston’s Case* (1902) 28 VLR 357, both concerning questions arising under Commonwealth laws.

³ See *Burns* (2018) 265 CLR 304 at [131]-[132] (Nettle J) and the authorities cited at fn 235; see also *Rizeq* (2017) 262 CLR 1 at [6] (Kiefel CJ), citing *Felton v Mulligan* (1971) 124 CLR 367 at 394 (Windeyer J).

⁴ *Rizeq v Western Australia* (2017) 262 CLR 1 at [60]-[61] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Masson v Parsons* (2019) 266 CLR 554 at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at [37] (Kiefel CJ, Gageler and Gleeson JJ); *R v McGregor* (2026) 100 ALJR 287 at [12], [34] (Gageler CJ, Gleeson and Beech-Jones JJ), [119]-[120] (Edelman J).

⁵ Eg, s 6(1) of the *Interpretation of Legislation Act 1984* (Vic).

⁶ (2017) 262 CLR 1 at [104] (Bell, Gageler, Keane, Nettle and Gordon JJ).

lack legislative power to enact such a law. The withdrawal of State jurisdiction over federal matters means only that the State law is, on its own, “constitutionally ineffective”⁷ because, being directed to State jurisdiction in respect of Commonwealth offences, it has no field of operation. But it remains capable of being picked up and applied by s 68(1) of the *Judiciary Act*.

8. *Fourthly*, to construe a State law in this manner is consistent with the fact that the State Parliament is legislating in the context of s 68 of the *Judiciary Act*. In considering the operation of s 68, “the starting point is s 68(2), which confers federal jurisdiction, before considering s 68(1), which confers the power within that jurisdiction”.⁸ Both State and Territory Parliaments can be deemed to know that s 68(2) of the *Judiciary Act* has, since 1903 and 1976 respectively,⁹ invested State and Territory courts with jurisdiction to hear and determine matters arising under federal criminal law and that s 68(1) provides expressly for State and Territory bail laws to be picked up and applied to the hearing and determination of federal criminal matters.¹⁰

9. Accordingly, provisions of a State bail law that expressly refer to Commonwealth offences are not intended to operate, and do not operate, as a legislative “attempt” to regulate the exercise of federal jurisdiction “directly” or “of their own force”: cf CS [42]. Rather, because they are enacted in the context of the conferral of jurisdiction by s 68(2) of the *Judiciary Act*, they are intended to operate only through the medium of s 68(1) so as to regulate the exercise of federal jurisdiction by the State courts. This follows as a matter of construction: such laws are “laws of a State or Territory respecting ... the procedure for ... holding accused persons to bail” which are “applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory” by s 68(2).

⁷ *Director of Public Prosecutions (Cth) v Germakian* [2006] NSWCA 275 at [44] (Basten JA).

⁸ *Farshchi v The King* (2025) 100 ALJR 6 at [25] (Edelman and Steward JJ).

⁹ See *Judiciary Amendment Act 1976* (Cth), ss 3, 14.

¹⁰ See *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* (2003) 135 FCR 346 at [13] (Ryan and Finkelstein JJ); see also *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at [75] (Kirby J) (dissenting in the result, which concerned the scope of the federal jurisdiction with which the District Court of New South Wales was invested by s 39(2) of the *Judiciary Act*, but noting that “State law-makers can be deemed to know that, under s 39(2), virtually since federation, alterations to the ‘limits of [the] several jurisdictions’ of the ‘Courts of the States’ ipso facto alter the capacity of such courts to be ‘invested with federal jurisdiction’ in the designated matters”).

10. This construction coheres with (rather than undermines or detracts from) the purpose of s 68 of the *Judiciary Act*, being “to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice”.¹¹ In this connection, it may be noted that the extrinsic materials relating to certain amendments to Victorian bail laws reflect an understanding of the complementary role of State and Commonwealth laws in achieving that single, composite system of criminal justice.¹²

Part IV: Estimated time

11. In Victoria’s primary submissions dated 6 August 2026, it sought 15 minutes for oral
10 argument. It does not seek any additional time to address these supplementary matters.

Dated: 16 September 2026



Alistair Pound SC
Solicitor-General for Victoria
03 9225 8249
alistair.pound@vicbar.com.au



Elizabeth Brumby
Ninian Stephen Chambers
03 9225 8444
elizabeth.brumby@vicbar.com.au

¹¹ *Williams v The King (No 2)* (1934) 50 CLR 551 at 560 (Dixon J); *McGregor* (2026) 100 ALJR 287 at [65] (Gordon and Steward JJ).

¹² For example, in 1986, in the Second Reading Speech for the Bail (Amendment) Bill 1986, which inserted references to certain offences under the *Customs Act 1901* (Cth), the Victorian Attorney-General noted that the Commonwealth Director of Public Prosecutions “has expressed concern to me about the present situation under which State drug offences attract the reverse onus [bail test] but Commonwealth ones do not”: Victoria, *Parliamentary Debates*, Legislative Council, 5 December 1986, 1633 (J H Kennan, Attorney-General). In 2005, a review of Victorian bail laws noted that the “Commonwealth DPP has suggested various amendments to the *Bail Act* to ensure that attempting to and conspiring to commit various offences under the *Customs Act* attract the exceptional circumstances test or show cause test”: Victorian Law Reform Commission, *Review of the Bail Act – Consultation Paper* (2005) at 85, Appendix 4. In 2017, the Council of Australian Governments (COAG) agreed that a presumption against bail and parole for persons with links to terrorist activity would be implemented by legislation “underpinned by nationally consistent principles”: see COAG Communiqué dated 9 June 2017 at 1; COAG Communiqué dated 5 October 2017 at 2. Also in 2017, the Commonwealth Director of Public Prosecutions suggested (via submissions to the Coghlan Review) amendments to Victoria’s bail regime to ensure that certain Commonwealth drug offences were captured by tests imposing a higher threshold for granting bail: see Paul Coghlan QC, *Bail Review – First Advice to the Victorian Government* (2017) at [4.65], [4.72].

ANNEXURE TO VICTORIA'S SUPPLEMENTARY SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable dates
1.	<i>Criminal Procedure Act 2004</i> (WA)	Version 02-a0-00	s 114(2)	Version applicable in <i>Rizeq v Western Australia</i> (2017) 262 CLR 1	26 September 2013
2.	<i>Interpretation Act 1984</i> (WA)	Current	s 7	Illustrative purposes only	All relevant times
3.	<i>Interpretation of Legislation Act 1984</i> (Vic)	Current	s 6(1)	Illustrative purposes only	All relevant times
4.	<i>Judiciary Amendment Act 1976</i> (Cth)	As enacted	ss 3, 14	As enacted (amending Act)	All relevant times
5.	<i>Punishment of Offences Act 1901</i> (Cth)	As enacted	Entire Act	Illustrative purposes only	N/A