



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

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OUTLINE OF ORAL SUBMISSIONS OF THE NORTHERN TERRITORY

INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the Internet.

PART I PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. The plaintiffs advance three cases: (i) the *Kable* case at ASOC [19]-[23] seeking to invalidate s 7A(2AB) in all its applications by reference to *Lim* (ASOC [25(1)]) (see Question 3 at **SCB 77**); (ii) the *Lim*-only case at ASOC [24.1] impugning s 7A(2AB) only in its application to those accused of Commonwealth offences (ASOC [25(2)]) (see Question 4(a) at **SCB 77**); and (iii) the *Rizeq* case referable only to specific sub-pars of s 7A(1) (ASOC [24.2]) (see Question 4(b) at **SCB 77**).
- 10 2. **First answer to cases (i) and (ii):** both depend on the proposition at ASOC [19] that s 7A(2AB) is a law authorising and requiring detention for the purposes of *Lim* but it is not.
 - 2.1. ASOC [19.1] adopts a path of reasoning rejected in *Falzon JBA 6/70* [53]-[57], and [68]-[87].
 - 2.2. ASOC [19.2] contends that by reason of alleged “gaps” in the express remand powers in the statutory scheme, s 7A(2AB) should be construed to contain an implied power to remand. There are no such “gaps” and, in any event, s 7A(2AB) could not be construed as containing any such implied power.
 - 2.3. The plaintiffs’ conceptions of bail, and of custodial powers during various points in the criminal process, are inconsistent with the statutory text and history.
- 20 **DS [11], [18]-[42], [52]-[55]; cf Reply [5]-[6].**
3. Five scenarios illustrate these propositions, and the issues of **standing** which arise.
 - 3.1. **Prior to first court appearance.** With warrant: *Local Court (Criminal Procedure) Act 1928* (NT) **JBA 3/37**, ss 58, 62(a), 103, 105; *Criminal Code NT JBA 3/31*, s 301. Without warrant: *Police Administration Act 1978* (NT) **JBA 3/39**, ss 123, 124, 137. Once detained, bail, if granted, is an entitlement to a liberty-enhancing arrangement, temporally and conditionally limited: *Bail Act 1982* (NT) **JBA 1/4**, ss 3, 7, 7A, 8, 9, 10, 13, 16, 25-26, 28, 33. *Cabal* (2001) 209 CLR 165 at [5], [62]; *Turnbull* at CLR 43-44 **JBA 9/90**.
 - 3.2. **Youth before a court on charges:** *Youth Justice Act 2005* (NT) **JBA 3/42**, s 65.
 - 30 3.3. **Adult before the Local Court on charges:** *Local Court (Criminal Procedure) Act 1928* (NT) **JBA 3/38**, ss 59, 60, 65 (read in context of ss 62-65), 113 (read in

context of ss 112A-115, 120A, 121A, 122A, 124, 131A). *Cf* ss 100, 105C, 105D.
Mr Mardinga's facts illustrate these powers: **Amended SC [14C]-[14M]**.

3.4. Adult being tried or sentenced in the Supreme Court for an indictable offence:

Local Court (Criminal Procedure) Act 1928 (NT) **JBA 3/37** ss 112, 136; *Criminal Code* (NT) **JBA 3/31**, s 334. Committal is detention, whether admitted to bail or not: *Grassby* at CLR 12 **JBA 7/74**; ss 297A-301.

3.5. Bail pending appeal: *Bail Act 1982* (NT) **JBA 1/4**, s 3(2), 6; *Local Court (Criminal Procedure) Act 1928* (NT) **JBA 3/37**, s 168, 169; *Criminal Code* (NT) **JBA 3/31**, ss 420, 425, 430. *Falzon* **JBA 6/70** [58]-[59].

- 10 4. Section 7A(2AB) does not authorise the detention of a person. It is properly characterised as a provision that sets out one criterion, among several, for bail which, if granted, relieves a person from the detention to which they are exposed under various statutory provisions on account of being charged with an offence and which reflect essential aspects of common law history. Even if *Lim* applies to the Territory, s 7A(2AB) is not a law which engages it.
5. **Second answer to cases (i) and (ii):** within this statutory scheme, the various powers to remand an accused in custody between court hearings are reasonably necessary for the constitutionally permissible purpose of ensuring the accused's availability to be dealt with, by a court, on the charges according to law. *Lim* at CLR 27-28 **JBA 6/69**; *Vella* at [157] **JBA 10/95**; *EGH19* at [107], [208], [318(1)] **JBA 11/101**. "Necessary" means reasonably appropriate and adapted rather than essential or indispensable: *Jones* at [42]; *YBFZ* at [18], [251]. While consideration is required of means and ends and the relationship between them (see *NZYQ* [44]), structured proportionality testing is not involved: *Jones* at [43], [78], [203]; *EGH19* at [38]. **DS [12]-[25], [57]-[65]**.
- 20 6. The status of an accused as such is constitutionally and historically relevant, exposing them, in contradistinction with other members of the community, to confinement of their liberty, from the time of being charged with an offence under various statutes and the common law and throughout the criminal trial process: *Constitution*, s 120. **DS [13]-[14], [18]-[37], [38]-[44], [54], [59], [68], [72]**.
7. It is relevant to consider the recipient of the power, the manner and conditions for its exercise, and its relationship to ordinary incidents of judicial power: *Lim*, *YBFZ*, *EGH19*.
30 Aside from police bail, the detention is imposed by a court as a matter of judicial discretion

and following its usual procedures in respect of bail, including the provision of reasons. *Emmerson* at [56]-[69] is instructive (**JBA 5/63**). **DS [15], [59], [66]-[67], [71], [73]**.

8. Bail is also liberty infringing: *Vella* [157]; *EGH19* [107]; consider also *NZYQ* at [28]; *YBFZ* at [14]; *EGH19* at [13]-[14], [80], [119], [207]-[208], [285], [330], [334], [357], [360]. More than one type of arrangement may be constitutionally sustainable for the same purpose. The criteria that Parliament selects for determining which arrangement (or none) will apply, and the objects of such criteria, do not diminish the sustaining purpose. See *NZYQ* at [50], citing *Re Woolley* at [26]; *Chau v DPP* at NSWLR 646 (**JBA 11/99**); *Behrooz* (2004) 219 CLR 486 at [21]. Detention does not become illegitimate merely because multiple purposes are pursued, so long as the duration does not exceed the period reasonably necessary for the sustaining purpose: see *Williams* **JBA 10/98**, *NAAJA v NT* **JBA 8/83** and *Cabal* [61]-[62]. The criterion in s 7A(2AB) shares the same or similar objects to other provisions not challenged (s 7A(2AA), 24(1)(aa)) and historical practice. **DS [13]-[14], [44]-[50], [59]-[65], [68]-[70], [72]**.

9. **Third answer to case (i):** *Kable* does not incorporate *Lim*. *Lim* cannot apply directly to the States and Territories which do not have the same constitutional separation of powers. The analysis involved in applying *Lim* might be relevant to applying *Kable*; for example, the absence of key procedural protections may be relevant to whether the law is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose as well as to whether the function absent those protections impairs the institutional integrity of the court. The alleged *Lim* problems at ASOC [22] even if established do not reveal any substantial interference with institutional integrity for *Kable*. **DS [75]**.

10. There is a long history of the Parliament legislating the criteria for the grant of bail, with which courts must comply. Section 7A(2AB) fits comfortably in this tradition, imposing a criterion, to be applied judicially and in conjunction with the ordinary incidents of judicial power. It does not substantially impair institutional integrity. See **DS [74]-[76]**.

11. **Answer to case (iii):** The Self-Government Act establishes an independent Territory legislative power in the widest possible terms, including power to regulate the exercise of federal jurisdiction insofar as it pertains to the Territory. Alternatively, there is no *Rizeq* (**JBA 9/91**) issue because the law is contingent (depending on, eg, s 68(1) **JBA 2/17**) and does not directly command courts as to the exercise of federal jurisdiction. **DSupp**.



Fiona Roughley, Christopher Tran, Priyanka Banerjee

Dated: 8 October 2026