



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Constitutional validity of s 7A(2AB) of the *Bail Act 1982* (NT) (CS [6]-[39])

2. The validity of s 7A(2AB) is resolved by asking whether the provision purports to confer on a Territory court a function or power which is repugnant to, or incompatible with, its institutional integrity. It is not resolved by asking whether s 7A(2AB) is “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”: cf **PS [11]**.

The position in respect of Commonwealth laws

3. The latter question emerged from consideration of whether a Commonwealth law that authorised the involuntary detention of a person in custody by the Executive impermissibly purported to confer authority to exercise any part of the judicial power of the Commonwealth other than on a court: *Lim* (1992) 176 CLR 1 (**Vol 6, Tab 69**).
4. In *Benbrika [No 1]* (2021) 272 CLR 68 (**Vol 8, Tab 81**) this Court held that a Commonwealth law may only confer power on a court to detain a person in custody if the power is either an incident of adjudging and punishing criminal guilt, or otherwise justified as an “exceptional case”:
 - (a) That limit on Commonwealth legislative power, which concerned the conferral of power on courts, was distinct from the limit at issue in *Lim*, which concerned the conferral of power other than on courts: *Benbrika [No 1]* at [28] (Kiefel CJ, Bell, Keane and Steward JJ).
 - (b) To the extent that a basis for that limit on Commonwealth legislative power was articulated in *Benbrika [No 1]*, it was linked to the separation of powers effected by Ch III: at [28]-[29], [35] (Kiefel CJ, Bell, Keane and Steward JJ), [71]-[72] (Gageler J), [134]-[137] (Gordon J).
5. In *NZYQ* (2023) 280 CLR 137 (**Vol 9, Tab 86**) at [39], this Court restated the principle in *Lim* in terms that encompass Commonwealth laws conferring power both on the Executive and on courts. As a result of that restatement, whether a Commonwealth law that authorises detention by a court, other than as an incident of adjudging and punishing

criminal guilt, is justified as an “exceptional case”, is to be determined by asking whether the power to detain is “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”.

The position in respect of State and Territory laws

6. The relevant constitutional limit on State and Territory legislative power is not the same as the limits imposed by Ch III on Commonwealth legislative power. Instead, the relevant limit is that a State or Territory law cannot confer on a court powers or functions that are repugnant to, or incompatible with, the institutional integrity of that court, such that they substantially impair the court’s institutional integrity: *Fardon* (2004) 223 CLR 575 (**Vol 6, Tab 71**) at [101] (Gummow J); *Emmerson* (2014) 253 CLR 393 (**Vol 5, Tab 63**) at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
7. That limit on State and Territory legislative power operates to protect the same constitutional values as the limits on Commonwealth legislative power derived from Ch III: *Garlett* (2022) 277 CLR 1 (**Vol 7, Tab 73**) at [184] (Gordon J).
8. Accordingly, it may be relevant to determining whether a law substantially impairs the institutional integrity of a State or Territory court that the law authorises the court to detain a person in custody other than as an incident of adjudging and punishing criminal guilt: **CS [19]**.
9. However, the absence of a separation of powers at the State and Territory level entails that the relevant constitutional values are not protected in the same way or to the same extent: **CS [14]**; see *Vella* (2019) 269 CLR 219 (**Vol 10, Tab 95**) at [56] (Bell, Keane, Nettle and Edelman JJ).
10. Application of the *Kable* principle requires close attention to the detail of the impugned legislation and the nature of the process in which it requires a court to engage: *Fardon* (2004) 223 CLR 575 (**Vol 6, Tab 71**) at [90], [104] (Gummow J). Applying that approach, s 7A(2AB) does not substantially impair the institutional integrity of the relevant Territory courts: **CS [32]-[39]**.

Purported regulation of the exercise of federal jurisdiction (CS [40]-[44], CRS [1]-[7])

11. It is only necessary for this Court to answer Question 4(b) if the answers to Questions 3 and 4(a) are “no”: **CRS [2]**. If reached, to the extent that s 7A of the *Bail Act* purports to apply, directly and of its own force, to regulate the grant or refusal of bail by a court in

the exercise of federal jurisdiction, the provision is beyond Northern Territory legislative power and is invalid. The matter arises from the facts agreed at **ASC [42]-[43]**, **ASCB 76**, and on the premise that NAAJA has standing.

12. No Commonwealth law enacted pursuant to s 122 of the Constitution confers power on the Northern Territory to regulate the exercise of federal jurisdiction: **CS [40]**. The *Northern Territory (Self-Government) Act 1978* (Cth) does not confer such power: **CRS [5]**; *Capital Duplicators* (1992) 177 CLR 248 (**Vol 6, Tab 68**) at 281-283 (Brennan, Deane and Toohey JJ); cf **NTSS [6]**.
13. A Northern Territory law applying to courts that is expressed in terms only capable of operating in relation to the exercise of federal jurisdiction (as opposed to a generally expressed law) cannot be read down as applying to the exercise of Territory jurisdiction, and therefore has no valid operation. A law such as s 3A(1) of the Bail Act cannot be read so that the reference to “Territory sexual offence” is translated to “Commonwealth sexual offence” without changing its meaning. Nor can it be suggested that Territory provisions referable to a police officer considering bail applications in respect of federal offences can be picked up and applied by s 68(1), as a Commonwealth law, to a Territory court exercising federal jurisdiction: cf **NSWSS [6]**. That does not involve a translation but an impermissible transposition between categories.
14. Even if s 7A(1)(d), (da) and (f) could be given a contingent operation (which they cannot), s 68(1) of the *Judiciary Act 1903* (Cth) could not pick up those provisions and apply them to a court exercising federal jurisdiction under s 68(2). In referring to “laws”, s 68(1) picks up valid Territory laws, not mere text: **CRS [6]**. Like s 79 of the *Judiciary Act*, s 68(1) cannot restore to life invalid laws: *Agtrack* (2005) 223 CLR 251 (**Vol 5, Tab 60**) at [61]; *GPAO* (1999) 196 CLR 553 (**Vol 9, Tab 85**) at [38]. There is no relevant distinction between a law invalid by reason of s 109 of the Constitution and one invalid by reason of an absence of Territory legislative power (or Territory laws invalid on other grounds).

Dated: 8 October 2026



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