



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
FOR NEW SOUTH WALES (INTERVENING)**

Part I: CERTIFICATION

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

Part II: OUTLINE OF ARGUMENT

2. *Application of the Lim principle is not determinative of the Kable analysis in this case* (NSW [16]-[32]): The argument now made by the plaintiffs was effectively rejected in *Garlett v Western Australia* (2022) 277 CLR 1 (**JBA Vol 7, Tab 73**) at [7], [39]-[40] (Kiefel CJ, Keane and Steward JJ), [175], [178], [184] (Gordon J), [241]-[248] (Edelman J), [292]-[295], [298], [301], [305] (Gleeson J).
3. The principle articulated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 173 CLR 1 (**JBA Vol 6, Tab 69**) at 26 is “a constitutive part of the doctrine of the separation of Commonwealth judicial power, not ... a doctrine about the nature of Ch III courts”: *Garlett* at [294] (Gleeson J). It would be a “serious constitutional mistake” to think that *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (**JBA Vol 7, Tab 77**) assimilates State courts with federal courts; “State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust...it does not follow that...the institutional integrity of those courts is compromised”: *Garlett* at [301] (Gleeson J, quoting McHugh J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (**JBA Vol 6, Tab 71**) at [36], [41]).
4. It follows that State and Territory courts can permissibly exercise powers (including non-judicial powers) that could not be conferred on a Ch III court while remaining appropriate repositories of federal judicial power.
5. If it can be shown that s 7A(2AB) of the *Bail Act 1982* (NT) (**NT Bail Act**) infringes the *Lim* principle – because it is not reasonably capable of being seen as necessary for a legitimate non-punitive purpose – that would tend to establish that the power is non-judicial in character (and potentially objectionable on policy grounds). However, that does not, in and of itself, provide a basis to conclude that the power is so extreme and offensive to the judicial function that it impairs the institutional integrity of the courts on which it is conferred. That is especially so where s 7A(2AB) falls to be applied in circumstances that exhibit all the hallmarks of proper judicial process (the provision is of general application, imposes a standard capable of judicial application, gives the

court a genuine evaluative role, accommodates procedural fairness, and calls for a decision based on the evidence supported by reasons).

6. To the extent that convergence of *Lim* and *Kable* is said to be motivated by a concern to protect the rule of law or liberty, that motivation is misguided because such a development of the law is liable to have *negative* consequences for those values. It may drive legislatures to confer powers to impose detention or other curtailments on liberty *on the executive* (which is unconstrained by the *Kable* doctrine): **NSW [30] (n 56)** and *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 (**JBA Vol 10, Tab 95**) at [90] (Bell, Keane, Nettle and Gordon JJ).
7. **Section 68 of the Judiciary Act 1903 (Cth)** (**NSW Supp [6]-[16]**): The Cth AG's argument involves three main steps. **First**, it is stated that it is beyond the legislative capacity of the States to enact laws that regulate the exercise of federal jurisdiction: **Cth [40]**. The NSWAG accepts that proposition but takes no position on whether the same obtains for the Territories. **Secondly**, the Commonwealth contends that s 7A(1)(d)-(da) and s 7A(1)(f), in referring expressly to Commonwealth offences, purport to regulate the exercise of federal jurisdiction: **Cth [43]**. The NSWAG takes no issue with that, except in relation to police bail: **NSW Supp [6]**. **Thirdly**, it is submitted at **CS [43]** that s 7A(1)(d)-(da) and (f) are incapable of being picked up by s 68(1) of the *Judiciary Act*, in circumstances where they purport to apply *only* in federal jurisdiction: see also **Cth Supp [6]**. This third submission should be rejected (assuming there is even a sufficient factual basis to determine that question, noting that the facts at **ASC [42]-[43]** fall within s 7A(1)(f) only, and there is a live issue as to whether NAAJA has standing by virtue of acting for persons referred to in those paragraphs of the amended special case).
8. The Cth AG has provided no principled basis grounded in the text, context or purpose of s 68(1) to explain why that provision cannot pick up a State law which purports to apply only in federal jurisdiction (and so cannot operate of its own force by reason of the lacuna in State legislative power identified in *Rizeq v Western Australia* (2017) 262 CLR 1 (**JBA Vol 9, Tab 91**)). In this regard, the Cth AG relies solely on *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 (**JBA Vol 5, Tab 60**) at [61] and *Northern Territory v GPAO* (1999) 196 CLR 553 (**JBA Vol 9, Tab 85**) at [38]. Properly understood neither authority mandates acceptance of the Cth AG's construction of s 68(1). The reasoning in each has been overtaken by the reasoning in *Rizeq* at [92],

and, in any event, does not deal with the circumstance where a State law cannot apply of its own force because of the lacuna identified in *Rizeq*.

9. Although s 68(1) is designed to achieve uniformity in the procedures applicable to State/Territory offences and Commonwealth offences, it is critical to appreciate that, like s 79, it also serves the purpose of overcoming the absence of State legislative power to command State courts as to the exercise of federal jurisdiction: *A-G (Cth) v Huynh* (2023) 280 CLR 341 (**JBA Vol 5, Tab 62**) at [41]-[42] (Kiefel CJ, Gageler and Gleeson JJ). That is why s 68(1) picks up State laws that are affected by that absence of power but may not pick up State laws that are invalid for other reasons.
10. Construing s 68(1) as picking up State laws which purport to regulate the exercise of federal jurisdiction (even if they have no operation in State jurisdiction) better serves the object of uniformity as well as the gap-filling function.

Dated: 8 October 2026


Zelie Heger SC

Luca Moretti