



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15/2025

BETWEEN: **NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED**
First Plaintiff

and

XAVIER MARDINGA
Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**

Filed on behalf of the Attorney-General for the State of Queensland

9 October 2026

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

The distinction between the Lim principle and the Kable principle

2. The *Lim* principle does not apply to the States and Territories via the operation of the *Kable* principle for three reasons.
3. First, the *Lim* principle and the *Kable* principle rest on different textual and structural foundations, have different rationales, and pose different tests: **QS [5(a)], [9]**.
4. The *Lim* principle is concerned with, and is an expression of, the separation of federal judicial power from Commonwealth executive and legislative power: **QS [10]-[11]**.
 - *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ) (**JBA vol 6, tab 69, p 2032**)
 - *Garlett v Western Australia* (2022) 277 CLR 1, 90 [247] (Edelman J), 106 [294] (Gleeson J) (**JBA vol 7, tab 73, pp 2411, 2427**)
5. The separation of powers, however, does not apply to the States and Territories: **QS [12]**.
 - *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 66-67 (Brennan CJ), 103 (Gaudron J), 109 (McHugh J), 137, 142 (Gummow J) (**JBA vol 7, tab 77, pp 2582-3, 2619, 2625, 2634, 2653, 2658**)
 - *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 617 [118] (Gageler J), 630 [164], 631-633 [166]-[169] (Keane J) (**JBA vol 8, tab 83, pp 3062, 3075, 3076-8**)
6. The *Kable* principle is concerned only with ensuring that State and Territory courts remain suitable repositories of federal jurisdiction: **QS [13]**.
 - *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 638 [185], 638-639 [187] (Keane J) (**JBA vol 8, tab 83, pp 3083-3084**)

7. The *Lim* principle may identify whether a function is exclusively judicial but the answer to this question is not determinative of whether a law infringes the *Kable* principle: **QS [14]**.
 - *Garlett v Western Australia* (2022) 277 CLR 1, 23 [40] (Kiefel CJ, Keane and Steward JJ), 90 [247] (Edelman J), 106 [294], 110-111 [307]-[309] (Gleeson J) (**JBA vol 7, tab 73, pp 2344, 2411, 2427, 2431-2**)
 - *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 90 [125] (Hayne, Crennan, Kiefel and Bell JJ) (**JBA vol 5, tab 61, p 1466**)
8. Secondly, extending the *Lim* principle to the States and Territories would be contrary to authority: **QS [16]-[18]**.
9. Thirdly, the scope of the *Kable* principle, as an implication of Ch III, depends on the text and structure of the Constitution.
 - (a) It is an error to reason from notions of pleasing symmetry with the limitations Ch III imposes on the Commonwealth Parliament to impose limits on the States and Territories: **QS [19]**.
 - *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 631-632 [166]-[167] (Keane J) (**JBA vol 8, tab 83, pp 3076-3077**)
 - (b) While liberty may be said to be one value protected by the separation of powers, the federal nature of the Constitution allows for different ways to protect that value: **QS [20]**. The absence of a separation of powers at the State and Territory level gives a relatively greater role to the legislature than at the Commonwealth level.
 - James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "The Relationship of the Individual to the State"', in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 180-1, 184 (**JBA vol 14, tab 135, pp 5169-5170, 5173**)
10. Extending one aspect of the *Lim* principle to the States and Territories would undermine the rationale of that principle because any infringement may be avoided by conferring prima facie punitive functions on the executive. That simply cannot occur at the Commonwealth level: **QS [22]-[24]**.

- Cf *EGH19 v Commonwealth* (2026) 100 ALJR 400, 410 [16]-[17], 412 [26] (Gageler CJ and Gleeson J) (**JBA vol 11, tab 101, pp 4101, 4103**)
- *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 121 (McHugh J) (**JBA vol 7, tab 77, p 2637**)
- *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 600 [40] (McHugh J) (**JBA vol 6, tab 71, p 2135**)

Legitimate purposes

11. But even if the *Lim* principle applies, the legitimate, non-punitive purposes of s 7A(2AB) of the *Bail Act* are not confined to ensuring the accused is available at trial: **QS [26]**.

- *R v Phillips* (1948) 32 Cr App R 47, 48-9 (**JBA vol 11, tab 112, pp 4395-6**)

12. If there is a requirement that the protection be from grave and specific harm for a Commonwealth law, that strict requirement does not apply to the States or Territories: **QS [28]**.

- *Garlett v Western Australia* (2022) 277 CLR 1, 34-35 [79]-[82] (Kiefel CJ, Keane and Steward JJ), 112 [310] (Gleeson J) (**JBA vol 7, tab 73, pp 2355-2356, 2433**)
- *EGH19 v Commonwealth* (2026) 100 ALJR 400, 433 [128] (Gordon J) (**JBA vol 11, tab 101, p 4124**)
- *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ) (**JBA vol 8, tab 81, p 2868**)

Dated: 9 October 2026.



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