



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

NOTHERN TERRITORY OF AUSTRALIA

Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSION

2. The institutional integrity doctrine (which as recognised in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (**Kable**) (V7, T77), extends to State courts) is derived from the text (the consistent use of the word “court” in Chapter III), context (the fact that all of the “courts” referred to in Chapter III can be conferred with federal judicial power) and purpose (the need identified by the Framers that courts exercising federal jurisdiction must be neutral tribunals fit for that task) of the *Constitution: Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 (**Forge**) (V6, T72), [185] (Kirby J).
3. When fastened to its constitutional foundations, the touchstone of the institutional integrity doctrine can be seen to be the maintenance of courts that are independent and impartial. This touchstone has guided the principled identification of the essential characteristics that courts with institutional integrity must possess: *South Australia v Totani* (2010) 242 CLR 1 (**Totani**) (V10, T93), [49]-[51], [60]-[62] (French CJ); SA, [16].
4. The touchstones of independence and impartiality mark the principled boundary of the operation of the doctrine, and in doing so provide coherence and stability to it: *Forge*, (V6, T72), [41] (Gleeson CJ). Conversely, to permit the notion of institutional integrity to encroach upon more abstracted and contestable notions of unfairness, for example, by incorporation of the principle recognised in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (**Lim**) (V6, T69) as the Plaintiffs contend, would introduce uncertainty to the scope of the doctrine and thereby destabilise it.
5. The instability of the implication pressed by the Plaintiffs is also apparent from its asymmetry if it were to be applied to the constitutions of the States. To accept the Plaintiffs’ submission, in the absence of the correlative principle concerning executive functions operating under the separation of powers doctrine at the Commonwealth level, may incentivise the conferral of functions that depart from the *Lim* principle on State executive bodies: SA, [29].

6. The above analysis does not seek to diminish the normative significance of the *Lim* principle. Rather, South Australia contends that the principle is to be supervised, maintained and modified (if necessary), by processes of representative and responsible government prevailing in the States and Territories: J Stellios, “Liberty as a Constitutional Value” in R Dixon (ed), *Australian Constitutional Values* (2018) (V14, T135), 179-184.

7. There are various questions of statutory construction in dispute between the Plaintiffs and Defendant in the present case. Should the Court prefer the construction proffered by the Plaintiffs then there are a number of features of the impugned provision that are drawn upon by the Plaintiff in aid of the *Kable* challenge that do not rely upon the invocation of the *Lim* principle. For instance:

7.1. Section 7A(2) requires the Court to step through a detailed decision, by reference to ss 24 and 24A, and the direction in s 7A(2AA), and arrive at a determination about whether bail should be granted. Then, s 7A(2AB) requires the Court to ignore that decision, put it aside, and make a separate decision on different criteria that then supersedes or overrides it: *Transcript*, 18 (746-772).

7.2. In the course of undertaking the s 7A(2AB) decision, the Act (whether formally or merely practically) places the burden on an accused to establish that they will not fall within either of the circumstances outlined in s 7A(2AB)(a) and (b): *Transcript*, 12 (457), 21 (885-890), 24 (1022), 26 (1096); *Kable* (V7, T77); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [96]-[98] (Gummow and Bell JJ).

7.3. In the course of undertaking the s 7A(2AB) decision, the Court might take into account evidence that may not be admissible in the trial of the accused: *Transcript*, 23-24 (995-1022); *Kable* (V7, T77), 90 (Toohey J), 105-108 (Gaudron J), 120, 122-123 (McHugh J) (V7, T77); compare *Garlett v Western Australia* (2022) 277 CLR 1 (V7, T73), [37] (Kiefel CJ, Keane and Steward JJ), [261] (Edelman J).

7.4. If satisfied, then the Court is required to make an order in the form of an order granting or refusing bail (the purpose of which is well understood at common law to serve the availability purpose) under the auspices of the *Bail Act 1982* (NT) (V1, T4), in a manner that cloaks the substance of the decision made which is in

its real nature a preventative detention order: *Transcript*, 15 (602-625); *Totani* (V10, T93).

In the event that this Court is satisfied that the impugned provision is invalid by virtue of these features (together or together with other features that do not draw upon the *Lim* principle), then it will be unnecessary for the Court to determine whether or not the *Kable* doctrine incorporates the *Lim* principle.

Dated: 9 October 2026

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MJ Wait SC
 Solicitor-General for South Australia



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JF Metzger
 Counsel for the Attorney-General (SA)