



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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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

D15 of 2025

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 THE
STATE OF WESTERN AUSTRALIA (INTERVENING)**

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. Western Australia relies on its written submissions and proposes to address the following points by way of amplification of those submissions:

3. NAAJA's submissions ask the Court to determine the validity of s 7A(2AB) of the *Bail Act 1982* (NT) on the basis that, as matter of principle, the *Lim* question (whether the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose) exhausts the analysis required to determine its validity for the purposes of the *Kable* principle – at least where the impugned law is a State or Territory law that authorises a State or Territory court to detain an individual (**NAAJA [2], [11], [13]-[14], [21], [29]-[45]; NAAJA OOA [3]-[5]; WA [14]**).

4. Western Australia agrees with the written submissions of New South Wales (**NSW [5]**) that it is strictly unnecessary for the Court to determine this issue of principle if it concludes that the answer to the *Lim* question in relation to s 7A(2AB) is yes. See also **WA [26]**.

5. However, the issue becomes relevant if the Court concludes that the answer to the *Lim* question in relation to s 7A(2AB) is no. To the extent it is necessary for the Court to determine this issue of principle, Western Australia submits that:

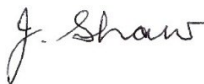
- (a) the *ratio* of the decisions in each of *Garlett* (2022) 277 CLR 1 (**JBA Vol 7, Tab 73, 2322**) and *Fardon* (2004) 223 CLR 575 (**JBA Vol 6, Tab 71, 2110**) are an answer to NAAJA's argument on this issue of principle (**WA [25]; cf Reply [9]**);

- (b) these cases considered statutory powers to detain individuals conferred on State courts by State legislation and each of the majority justices relied, as a step in their reasoning in support of the order of the Court, on the proposition that the answer to the *Lim* question does not *exhaust* the analysis required by the *Kable* principle. Or, put another way, the answer to the *Lim* question is not itself *determinative* of the validity of the impugned law: *Garlett* [39]-[40] (Kiefel CJ, Keane and Steward JJ), [247]-[248], [256]-[259] (Edelman J), see also [292]-[297], [306], [310]-[313], [314] (Gleeson); *Fardon* [18] (Gleeson CJ), [37], [40]-

[42] (McHugh J), [83], [85]-[87], [106] (Gummow J), [196]-[197] (Hayne J), [219] (Callinan and Heydon JJ) (**WA [17]-[24]**);

- (c) the Court should not entertain NAAJA's submissions that invite it to depart from the holdings of principle in those cases, as it has not sought leave to re-open those cases or sought to justify – by reference to the factors identified in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 or the two dimensions identified by Edelman J at [160]-[165] in *Vunilagi* (2023) 97 ALJR 627 (**JBA Vol 10, Tab 96, 3856**) – why the rules that have previously been applied by the courts across Australia on an important issue of legal principle should be disrupted: *MJZP v Director-General of Security* (2025) 99 ALJR 1108 [12]-[14] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ); *Vunilagi* (2023) 97 ALJR 627 [154]-[157] (Edelman J) (**WA [25]**);
- (d) NAAJA's reliance on *Wainohou* (2011) 243 CLR 181 [105] (Gummow, Hayne, Crennan and Bell JJ) (**JBA Vol 10, Tab 97, 3930**) in support of the proposition that the *Lim* question is a test for whether a law infringes the institutional integrity of a Ch III court (**NAAJA OOA [5.2]**) is misplaced; and
- (e) the observation made by their Honours at [105] of *Wainohou* compared the limits on State legislative power deriving from the *Kable* principle with the limits on Commonwealth legislation conferring non-judicial powers on judicial officers in their individual capacity as *persona designata*. (As to which, see also *Kable* (1996) 189 CLR 51, 104 (Gaudon J) (**JBA Vol 7, Tab 77, 2567**)).

Dated: 9 October 2026



Jean Shaw SC

James Bennett