



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 08 Oct 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: D15/2025
File Title: North Australian Aboriginal Justice Agency Limited & Anor v
Registry: Darwin
Document filed: Form 27F - Plaintiffs' outline of oral submissions
Filing party: Plaintiffs
Date filed: 08 Oct 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**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 PLAINTIFFS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

- 1 Section 7A(2AB) of the *Bail Act 1982* (NT) operates to require courts of the Northern Territory to refuse bail to a person based on an isolated consideration of community safety: **PS [24]-[26]**.
 - 1.1 The Bail Act governs the grant or refusal of bail by courts: ss 3AA, 6, 13, 20, 23, 49.
 - 1.2 Section 7A applies to a wide range of charged offences: ss 7A(1), 3(1), 3A, 3B.
 - 10 1.3 The bail evaluation under s 7A(2) requires consideration of the matters in s 24 (and s 24A for youths), which include matters concerning the vindication of judicial power in determining the charged offence.
 - 1.4 In the bail evaluation under s 7A(2), the consideration of the risk to the safety of the community is the “paramount consideration”: s 7A(2AA).
 - 1.5 Section 7A(2AB) operates as an additional and standalone stage — “*even if*” the court has reached the view that bail should be granted, and “*considered in isolation*” from the matters in ss 24 and 24A: see **SCB 160-161**; cf **138-139, 149**.
 - 1.6 Section 7A(2AB) does not permit any balancing of competing factors.
 - 20 1.7 By requiring a court to have a “high degree of confidence” as to a broad negative state of affairs concerning future conduct (with the practical onus falling on the person seeking bail), a person may be detained notwithstanding that it is not reasonably necessary for community safety: **PS [40]-[44]**.
- 2 Section 7A(2AB) is a law authorising and requiring detention: **PS [28]**; **Reply [3]-[6]**.
 - 2.1 A person charged with an offence is not in a default and ongoing “state of detention”.
 - 2.2 Once a bail application is made, the Bail Act supplies the rules governing whether a person is detained or released.

2.3 A necessary corollary of a court exercising the power to refuse bail under s 7A(2AB) is that the court will exercise an express or implied remand power.

- *Williams* (1986) 161 CLR 278 at 292, 305-306 (Mason and Brennan JJ) (**JBA Vol 10, Tab 98**).
- *Local Court (Criminal Procedure) Act 1928* (NT) ss 59-60, 113-114 (**JBA Vol 3, Tab 37**).
- **SCB 66-70 [14C]-[14Q]**.

3 Section 7(2AB) is designed to protect the safety of the community from a risk that may eventuate if the person is released on bail: see **PS [32]-[33]**; see also **Cth [34]**.

10 3.1 The purpose is of such elasticity that it cannot safely be described as a “non-punitive”: **PS [34]**.

3.2 The purpose does not identify the nature, degree or extent of the harm sought to be protected against and is therefore not “legitimate”: **PS [35]-[38]**.

- *YBFZ* (2024) 284 CLR 192 at [65], [76], [79], [81] (Gageler CJ, Gordon, Gleeson and Jagot JJ) (**JBA Vol 12, Tab 118**).

4 Even if s 7(2AB) has a legitimate and non-punitive purpose, it is not reasonably capable of being seen as necessary for that purpose: **PS [40]-[44]**; **Reply [14]**.

20 4.1 A law authorising pre-trial detention may pursue the legitimate and non-punitive purpose of enabling the vindication of judicial power in determining the charged offence, including by ensuring that an accused person is available to be dealt with by the court: **PS [10]-[11], [19]-[21]**; **Reply [12]**.

- *Lim* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ), 71 (McHugh J) (**JBA Vol 6, Tab 69**).
- *EGH19* (2026) 100 ALJR 400 at [317]-[318] (Jagot J) (**JBA Vol 11, Tab 101**).

4.2 However, s 7A(2AB) is not directed towards — and expressly excludes — the evaluative assessment of matters concerning the vindication of judicial power: **PS [30]-[32], [35]-[36]**; **Reply [12]-[13]**.

30 4.3 Even if protecting the safety of the community is relevant to the vindication of judicial power, the means employed by s 7(2AB) are not reasonably capable of being seen as necessary to that wider purpose: **PS [40]-[44]**; **Reply [14]**.

5 Section 7(2AB) substantially impairs the institutional integrity of the courts of the Northern Territory: **PS [7]-[14]; Reply [8]-[10]**.

5.1 A Commonwealth law that confers on a State or Territory “court” a power to detain a person will have the effect of substantially impairing the institutional integrity of that “court”, unless: (a) the power is exercisable by the court only as part of the performance of the function of adjudging and punishing criminal guilt; or (b) the power is justified as being within an exceptional case.

10 5.2 The same analysis applies to an equivalent State or Territory law. The Constitution does not permit of different grades or qualities of justice: all “courts” (Commonwealth, State or Territory) must maintain their “institutional integrity”; no legislature (Commonwealth, State or Territory) has power to enact a law that substantially impairs that institutional integrity.

- *Wainohu* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ) (**JBA Vol 10, Tab 97**).

5.3 Because of either its purpose, or the lack of tailoring between the means employed and its purpose, s 7(2AB) contravenes the institutional integrity limit on the legislative power of the Northern Territory.

- 20
- *EGH19* (2026) 100 ALJR 400 at [16]-[19], [24]-[27] (Gageler CJ and Gleeson J), [314], [288]-[289], [292], [327]-[331] (Jagot J) (**JBA Vol 11, Tab 101**).
 - *Garlett* (2022) 277 CLR 1 at [122]-[123], [135]-[139] (Gageler J), [184], [198]-[199] (Gordon J), [244]-[246], [248], [257] (Edelman J) (**JBA Vol 7, Tab 73**).

5.4 For the same reason, s 7(2AB) would, if applied by s 68(1) of the Judiciary Act to persons who are charged with Commonwealth offences, contravene the institutional integrity limit on the legislative power of the Commonwealth.



Bret Walker

8 October 2026