HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED & ANOR — PLAINTIFFS

AND

NORTHERN TERRITORY OF AUSTRALIA — DEFENDANT

North Australian Aboriginal Justice Agency Limited v Northern Territory
[2015] HCA 41
11 November 2015
M45/2015

ORDER

The questions asked by the parties in the special case dated 10 June 2015 and referred for consideration by the Full Court be answered as follows:

Question 1

Is Division 4AA of Pt VII of the Police Administration Act *(NT) (or any part thereof) invalid on the ground that:*

(a) it purports to confer on the executive of the Northern Territory a power to detain which is penal or punitive in character:

a. which, if it had been passed by the Commonwealth Parliament, would be beyond the powers of that Parliament under section 122 of the Constitution, which powers are limited by the separation of powers enshrined in the Constitution; and

b. which is therefore beyond the powers of the Legislative Assembly of the Northern Territory under the Northern Territory (Self-Government) Act 1978 *(Cth), which powers are subject to the same limits; and/or*

(b) it purports to confer on the executive (rather than the courts) of the Northern Territory a power of detention which is penal or punitive in character, thereby undermining or interfering with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution?

Answer

(a) Division 4AA of Pt VII of the Police Administration Act *(NT) does not confer on the executive of the Northern Territory a power to detain which is penal or punitive in character; it is otherwise unnecessary to answer this question.*

(b) No.

Question 2

Who should pay the costs of the Special Case?

Answer

The plaintiffs.

Question 3

What (if any) order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

Answer

The proceeding should be remitted to a single Justice of this Court for further directions.

Representation

M K Moshinsky QC with K E Foley and C J Tran for the plaintiffs (instructed by Ashurst Australia)

M P Grant QC, Solicitor-General for the Northern Territory with S L Brownhill for the defendant (instructed by Solicitor for the Northern Territory)

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with J S Stellios for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with B K Baker for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

G R Donaldson SC, Solicitor-General for the State of Western Australia with J D Berson for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

P J Dunning QC, Solicitor-General of the State of Queensland for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

M G Evans QC with D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

H Younan for the Attorney-General for the Australian Capital Territory, intervening (instructed by ACT Government Solicitor)

S E Pritchard SC with J E Davidson for the Australian Human Rights Commission, as amicus curiae (instructed by Australian Human Rights Commission)

CATCHWORDS

North Australian Aboriginal Justice Agency Limited v Northern Territory

Statutory interpretation – Div 4AA of Pt VII of *Police Administration Act* (NT) provides members of Northern Territory Police Force who arrest person without warrant in relation to infringement notice offence can detain person for up to four hours – Whether detention penal or punitive in character – Relevance of principle of legality – Relevance of principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

Constitutional law (Cth) – Separation of judicial power – Whether Legislative Assembly of Northern Territory subject to constitutional limitations which limit legislative power of Commonwealth Parliament – Interaction between s 122 and Ch III of Commonwealth Constitution.

Constitutional law (Cth) – Constitution – Ch III – Principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 – Whether Div 4AA of Pt VII of *Police Administration Act* (NT) conferred powers on Northern Territory executive which impaired, undermined or detracted from institutional integrity of Northern Territory courts.

Words and phrases – "infringement notice offence", "institutional integrity", "*Kable* principle", "penal or punitive", "separation of judicial power", "supervisory jurisdiction".

Constitution, Ch III, s 122.
Bail Act (NT), ss 16, 33.
Fines and Penalties (Recovery) Act (NT), ss 9, 12B, 13, 21, 22.
Police Administration Act (NT), Pt VII, Div 4AA; ss 123, 137, 138.
Police Administration Regulations (NT), reg 19A.

FRENCH CJ, KIEFEL AND BELL JJ.

Introduction

1 The first plaintiff is a corporation which provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. The second plaintiff is an Aboriginal person resident in the Territory who was arrested by an officer or officers of the Police Force of the Northern Territory ("the Police Force") in Katherine on 19 March 2015. She was taken into custody purportedly pursuant to s 133AB of the *Police Administration Act* (NT) ("the PA Act") which appears in Div 4AA of Pt VII of that Act.

2 Section 133AB of the PA Act empowers a member of the Police Force who has arrested a person without a warrant, on the basis of an offence for which an infringement notice can be issued, to hold that person in custody for a period of up to four hours, or longer if the person is intoxicated. The section provides for the person to be released unconditionally, released and issued with an infringement notice, released on bail or brought before a justice or court for the offence for which he or she was arrested or any other offence allegedly committed by the person.

3 The second plaintiff was held in custody for nearly twelve hours from 5.40pm on 19 March 2015 until her release at 5.20am on 20 March 2015. She was issued with an infringement notice bearing an issue date of 19 March 2015. It recorded two alleged offences. One was designated "use obscene/indecent behaviour" contrary to s 53(1)(a) of the *Summary Offences Act* (NT)[1]. The other was designated "bring liquor into restricted area" contrary to s 75(1) of the *Liquor Act* (NT)[2]. The infringement notice provided for the payment of fines of $144 and $50 respectively for the two offences and a levy of $40 with respect to each offence, making a total of $274.

4 In an amended statement of claim filed in proceedings commenced in this Court on 31 March 2015 by the first plaintiff and joined in by the second plaintiff on 19 May 2015, the plaintiffs allege that Div 4AA of Pt VII of the PA Act is invalid. They contend that it purports to confer on the Executive of the Northern

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1 Section 53(1)(a) of the *Summary Offences Act* (NT) makes it an offence, among other things, for a person to use any profane, indecent or obscene language in a public place, or within the view or hearing of any person passing therein.

2 Section 75(1) of the *Liquor Act* (NT) makes it an offence, among other things, for a person to bring liquor into a general restricted area. A general restricted area is a specified area of land declared to be a general restricted area under s 74(1)(a).

Territory a power to detain which is penal or punitive in character, which, if it had been passed by the Commonwealth Parliament, would be beyond the powers of that Parliament under s 122 of the Constitution, and which is therefore beyond the powers conferred on the Legislative Assembly of the Northern Territory by s 6[3] of the *Northern Territory (Self-Government) Act* 1978 (Cth).

5 Division 4AA is also said to confer on the Executive of the Northern Territory a power of detention which undermines or interferes with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution. The second plaintiff also alleges false imprisonment. Declaratory and other relief are sought.

6 A Special Case was referred to the Full Court in the proceedings by Nettle J on 3 June 2015[4]. It poses three questions. The first goes to the issues of validity, the second goes to the costs of the proceedings and the third asks what orders should be made in light of the answers to those questions.

7 For the reasons that follow, the plaintiffs' challenge to the validity of Div 4AA fails and the questions in the Special Case should be answered accordingly.

The Special Case questions

8 The Special Case poses the following questions:

"**Question 1:**

Is Division 4AA of Part VII of the *Police Administration Act* (NT) (or any part thereof) invalid on the ground that:

(a) it purports to confer on the executive of the Northern Territory a power to detain which is penal or punitive in character:

a. which, if it had been passed by the Commonwealth Parliament, would be beyond the powers of that Parliament under section 122 of the Constitution, which powers are

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3 Section 6 provides: "Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory."

4 [2015] HCATrans 135.

limited by the separation of powers enshrined in the Constitution; and

b. which is therefore beyond the powers of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* (Cth), which powers are subject to the same limits; and/or

(b) it purports to confer on the executive (rather than the courts) of the Northern Territory a power of detention which is penal or punitive in character, thereby undermining or interfering with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution?

Question 2:

Who should pay the costs of the Special Case?

Question 3:

What (if any) order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?"

The plaintiffs' case

9 The plaintiffs' primary case depended on a number of propositions:

1. The limitation on the legislative power of the Commonwealth imposed by the doctrine of separation of judicial power from legislative and executive powers applies to the Commonwealth Parliament's power to make laws under s 122 of the Constitution for the government of any Territory.

2. That limitation on the legislative power of the Commonwealth under s 122 applies to the legislative power of a Territory legislature conferred by a law of the Commonwealth made under s 122.

3. Division 4AA exceeds the legislative power of the Northern Territory Legislative Assembly because it confers a judicial power on non-judicial officers to detain persons in custody for a punitive purpose.

10 Alternatively, the plaintiffs argued that Div 4AA effectively withholds from the courts of the Territory judicial supervision of the exercise of the detention power. The supervision of executive detention of a subject in custody was said to be a defining characteristic of the Territory courts. The impugned provisions created powers effectively beyond the reach of the courts and on that

account were beyond the legislative power of the Territory based on the principles enunciated in *Kable v Director of Public Prosecutions (NSW)*[5] and subsequent decisions of this Court.

11 Before considering the constitutional validity of any statute, it is necessary to consider its construction and operation. Its construction will give effect to the ordinary meaning of its text in the wider statutory context and with reference to the purpose of the provision[6]. Further, the principle of legality favours a construction, if one be available, which avoids or minimises the statute's encroachment upon fundamental principles, rights and freedoms at common law[7]. That presumption, which is well established, has been called "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted"[8]. It is a presumption whose longstanding rationale is that it is highly improbable that parliament would "overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness"[9]. Its

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5 (1996) 189 CLR 51; [1996] HCA 24.

6 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

7 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2010] HCA 23; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591–592 [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at 622 [182] per Crennan, Kiefel and Bell JJ; [2011] HCA 47; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [30] per French CJ, Crennan and Kiefel JJ; [2012] HCA 19.

8 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40. See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519–520 [46]–[47] per French CJ; [2009] HCA 4; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at 622 [182] per Crennan, Kiefel and Bell JJ.

9 *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24, quoting *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ.

object was set out in the joint judgment of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen*[10]:

> "curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights."

It is a principle of construction which is not to be put to one side as of "little assistance" where the purpose of the relevant statute involves an interference with the liberty of the subject. It is properly applied in such a case to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty. As TRS Allan has written[11]:

> "Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction."

Part VII of the PA Act — police powers of arrest and apprehension

12 The PA Act established the Police Force, the "core functions" of which include "to uphold the law and maintain social order"[12], "to protect life and property"[13] and "to prevent, detect, investigate and prosecute offences"[14]. The Police Force consists of "a Commissioner and other members appointed and holding office under and in accordance with this Act."[15] The PA Act is

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10 (1994) 179 CLR 427 at 437–438.

11 Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 146 at 148.

12 PA Act, s 5(2)(a).

13 PA Act, s 5(2)(b).

14 PA Act, s 5(2)(c).

15 PA Act, s 6.

concerned with, among other things, the Police Force and its administration, and the powers and duties of members of the Police Force.

13 Part VII of the PA Act is entitled "Police powers". It includes Div 3 entitled "Arrest" and Div 4 entitled "Apprehension without arrest"[16]. Division 4AA of Pt VII is entitled "Taking person into custody for infringement notice offence". Division 4A relates to the power of a police officer to issue and serve a person with a notice to appear before the Court of Summary Jurisdiction. Division 6 deals with the bringing of detained persons before a justice of the peace or court and obtaining evidence after taking them into custody.

14 Section 121, which appears in Div 3, provides for the issue of arrest warrants by justices of the peace upon information on oath, supported by an affidavit, showing reasonable grounds for believing that the person the subject of the proposed warrant has committed an offence[17]. The justice must be satisfied that there are reasonable grounds for issuing the warrant[18].

15 Section 123, which also appears in Div 3, provides for arrest without warrant. It is the section under which the second plaintiff was arrested. It provides:

> "A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence."

It involves the exercise of two powers — arrest and taking into custody. The combination of those powers has a long history in the Northern Territory[19].

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16 Section 128 in Div 4 of Pt VII of the PA Act provides for apprehension of an intoxicated person and taking him or her into custody but, by operation of s 129, "only for so long as it reasonably appears ... that the person remains intoxicated." The apprehension is not an arrest.

17 PA Act, s 121(1) and (3).

18 PA Act, s 121(3).

19 Before the PA Act, s 27(1)(e) in Pt IV of the Police and Police Offences Ordinance 1923 (NT) provided that a police officer "without any warrant other than this Ordinance ... may apprehend ... any person whom he has just cause to suspect of having committed, or being about to commit, any felony, misdemeanour or offence". Part IV was repealed by the *Summary Offences Act* 1978 (NT), which commenced operation on the same date as the PA Act in 1979. In its original form,

(Footnote continues on next page)

Division 4AA — custody for an infringement notice offence

16 Division 4AA applies to a subset of the cases in which a person has been arrested without warrant under s 123. They are cases in which the person has been arrested in relation to the commission or apprehended commission of an infringement notice offence. The operative provision of Div 4AA, s 133AB, confers a power upon an officer to take a person arrested in relation to an infringement notice offence into custody and to hold him or her for up to four hours, or longer if he or she is intoxicated. That power is enlivened at the point of arrest under s 123. It is not necessary for the operation of s 133AB to treat the reference to taking a person into custody in that provision as creating a power distinct from that under s 123. The distinct power created by s 133AB is to hold the person arrested and taken into custody with the option of release with an infringement notice. Section 133AB provides:

"(1) This section applies if:

(a) a member of the Police Force has arrested a person without a warrant under section 123; and

(b) the person was arrested because the member believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence.

(2) The member may take the person into custody and:

(a) hold the person for a period up to 4 hours; or

(b) if the person is intoxicated — hold the person for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated.

(3) The member, or any other member, on the expiry of the period mentioned in subsection (2), may:

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s 123(1) of the PA Act authorised arrest without warrant. Section 123(2) provided that a police officer could detain a person to ensure the person's appearance before a court; to prevent a continuation or repetition of the offence; or to prevent loss or destruction of evidence relating to the offence. Section 123(2) was repealed (by the *Police Administration Amendment Act (No 2)* 1992 (NT)) because the objectives of s 123(2) were achieved by s 137(2): see Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 March 1992 at 4268.

(a) release the person unconditionally; or

(b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or

(c) release the person on bail; or

(d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

(4) For deciding how to deal with the person under subsection (3), the member, or another member, may question the person about the infringement notice offence, or any other offence in relation to which the person is of interest to police."

17 The term "infringement notice offence" is defined in s 133AA as "an offence under another Act for which an infringement notice may be served and which is prescribed for this Division by regulation." The term "infringement notice" is not defined in the PA Act. Its meaning appears from s 9 of the *Fines and Penalties (Recovery) Act* (NT):

> "An infringement notice is a notice issued under a law of the Territory to the effect that the person to whom it is directed has committed a specified offence and that the person may expiate the offence by paying the penalty specified in the notice in the manner and within the time specified."

18 Infringement notice offences are prescribed by reg 19A of the Police Administration Regulations (NT). They cover a wide class of offences, most of which are relatively minor. A substantial number of them do not carry any custodial penalty[20]. There are some, however, which provide for a monetary penalty and/or a custodial term to be imposed[21]. A number of the offences prescribed could, according to the circumstances, involve elements of disorderly conduct. However, they also include the offence of failing to keep a clean yard

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20 There are 25 offences in that category according to a table contained in the Special Case.

21 For example, offensive conduct under s 47 of the *Summary Offences Act* (NT) and obscenity under s 53(1)(a) of the *Summary Offences Act* (NT).

so as to create a nuisance by an offensive smell or otherwise[22] and failing to comply with liquor licence conditions[23].

19 Section 133AC requires that a member of the Police Force establish the identity of a person taken into custody under s 133AB, by taking and recording the person's name and further information relevant to identification including photographs, fingerprints and other biometric identifiers[24]. The person may also be searched and money, valuables or items that are likely or could be used to cause harm to the person or another person removed from the person for safekeeping[25]. Such force as is "reasonably necessary" to exercise a power under s 133AC may be used[26].

The infringement notice process

20 The effect of an infringement notice is set out in the *Fines and Penalties (Recovery) Act*. If the penalty specified in the notice is paid within the period specified or within the further time allowed by an enforcement agency under s 12B, the alleged offence is expiated and no further proceedings can be taken in relation to it unless the notice is withdrawn in accordance with the law under which the notice was issued[27]. A person may elect, under s 21 of the Act, to be dealt with by a court. In that event, proceedings in respect of the alleged offence may be taken as if an infringement notice had not been issued[28]. Regulation 6 of the Summary Offences Regulations (NT) makes similar provision for infringement notice offences under the *Summary Offences Act*.

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22 *Summary Offences Act* (NT), s 78.

23 *Liquor Act* (NT), s 31A(5).

24 PA Act, s 133AC(1).

25 PA Act, s 133AC(2).

26 PA Act, s 133AC(7).

27 *Fines and Penalties (Recovery) Act* (NT), s 13. Section 14 provides that if the penalty is not paid within the period specified or allowed, enforcement action may be taken under the Act unless the notice is withdrawn.

28 *Fines and Penalties (Recovery) Act* (NT), s 22(1).

Court, bail or release — ss 123 and 137

21 Before considering the operation of Div 4AA, it is necessary to set out the relevant obligations imposed upon a police officer arresting a person without warrant under s 123 and taking the person into custody under that section. The taking of a person into custody under s 123 immediately engages the obligation imposed by s 137(1), which appears in Div 6, and provides:

> "Without limiting the operation of section 123, but subject to subsections (2) and (3) of this section, a person taken into lawful custody under this or any other Act shall (subject to that Act where taken into custody under another Act) be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the *Bail Act* or is released from custody."

22 The effect of s 137(1) of the PA Act is that a person arrested and taken into custody under s 123 must "as soon as is practicable":

(1) be released; or

(2) be granted bail[29]; or

(3) be brought before a justice or a court[30].

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29 Release on bail may be effected by an authorised police officer pursuant to s 16 of the *Bail Act* (NT). Under s 33, a refusal is reviewable by a magistrate or justice as is a failure to determine whether or not to grant bail within four hours after the person is charged.

30 The legislative history discloses that, before the PA Act, s 34 of the Police and Police Offences Ordinance 1923 (NT) provided that any person apprehended without a warrant was to be secured until he or she was granted bail or could be brought before a justice to be dealt with according to law. Section 136 of the PA Act required a police officer to bring a person arrested and charged for an offence before a justice or to take steps to initiate the bail application process. Section 136 was repealed by the *Police Administration Amendment Act* 1982 (NT) to coincide with the commencement of the *Bail Act* 1982 (NT), which provided a comparable provision in s 16. Section 137(1) and (2) were introduced by the *Police Administration Amendment Act* 1988 (NT) in response to this Court's decision in *Williams v The Queen* (1986) 161 CLR 278; [1986] HCA 88. Cognate amendments were also made to s 16 of the *Bail Act* by the *Bail Amendment Act*

(Footnote continues on next page)

The period of custody limited by the requirement to bring the person before a justice of the peace or a court "as soon as is practicable after being taken into custody" may be extended, pursuant to s 137(2) and (3), to "a reasonable period" for questioning or to enable further investigations in relation to offences attracting a term of imprisonment. The factors relevant to determining a reasonable period of custody for those purposes are set out in s 138. They are practical matters including the time taken for various arrangements to be made for investigators to attend[31], available witnesses to be interviewed[32], legal advisors to be contacted[33], and forensic investigations to be completed[34].

23 The statutory requirement to bring a person arrested before a justice of the peace or a court, as soon as is practicable, has its origins in the common law. The common law does not authorise the arrest of a person or holding an arrested person in custody for the purpose of questioning or further investigation of an offence[35]. A person can be deprived of personal liberty only to the extent and for the time which the law prescribes[36]. It is an obvious application of the principle of legality that clear words are required if a statute is to authorise holding an arrested person in custody for a purpose other than for the purpose of charging that person and bringing him or her before a justice of the peace or court as soon as is practicable if he or she is not earlier released on bail or unconditionally. In *Williams v The Queen*, Wilson and Dawson JJ construing the words "as soon as is practicable" in s 34A(1) of the *Justices Act* 1959 (Tas) said[37]:

> "Those words must be given a construction which, so far as is possible, is in accordance with the common law ... The common law requires an

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1988 (NT): see Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 September 1987 at 1228–1230.

31 PA Act, s 138(a).

32 PA Act, s 138(c).

33 PA Act, s 138(h).

34 PA Act, s 138(k).

35 *Williams v The Queen* (1986) 161 CLR 278 at 292–294 per Mason and Brennan JJ, 305–306 per Wilson and Dawson JJ.

36 (1986) 161 CLR 278 at 292 per Mason and Brennan JJ.

37 (1986) 161 CLR 278 at 313.

> arrested person to be taken before a justice as soon as is reasonably possible and the words 'as soon as is practicable' should be taken to mean the same thing."

24 Absent s 137, the common law would have imposed the like requirement that a person arrested under s 123 be taken before a justice of the peace as soon as practicable after arrest. At common law delay, even if for some purpose such as questioning or to dispel or confirm the suspicion which was the basis of the arrest, would defeat the true purpose of arrest[38]. Custody after arrest is an executive measure not an exercise of judicial power. As Wilson and Dawson JJ also observed in *Williams*[39]:

> "The point at which an arrested person is brought before a justice upon a charge is the point at which the machinery of the law leading to trial is put into operation. It is the point from which the judicial process commences and purely ministerial functions cease."

The common law was modified by s 137(2) and (3) to enable post-arrest custody to be extended to "a reasonable period" for the purpose of questioning the person arrested or for further investigations in relation to offences attracting custodial penalties[40]. Similar modifications have been made in all Australian jurisdictions[41]. That modification reflected recommendations made by the Australian Law Reform Commission ("the Commission") in its interim report entitled *Criminal Investigation* published in 1975.

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38 (1986) 161 CLR 278 at 306 per Wilson and Dawson JJ.

39 (1986) 161 CLR 278 at 306.

40 Section 137(3) was introduced by the *Police Administration Amendment Act (No 2)* 1992 (NT). The Second Reading Speech outlined the amendment in that Act resulted from, among other things, the Police Powers Review Committee's "consideration of ... the investigative detention power" under s 137(2): see Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 March 1992 at 4268.

41 *Crimes Act* 1914 (Cth), ss 23C–23DA; *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), ss 114–121; *Police Powers and Responsibilities Act* 2000 (Q), ss 403–411; *Summary Offences Act* 1953 (SA), s 78; *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 4; *Crimes Act* 1958 (Vic), ss 464A–464B; *Criminal Investigation Act* 2006 (WA), ss 140–142; *Crimes Act* 1900 (ACT), s 212.

25 The Commission's report in relation to post-arrest custody included a recommendation that its permissible duration be precisely specified in legislation with a statutory maximum of four hours. It was proposed that the limit be capable of extension up to another eight hours following application to a magistrate with further extensions obtainable from a Federal, Territory or State Supreme Court Judge[42]. The Commission also recommended that the four hour period be regarded as the maximum rather than the norm. The primary statutory requirement should be to take a person before a justice or a magistrate, to make a police bail decision or to release him or her "as soon as reasonably practicable" after the custody began[43].

Sections 133AB and 137

26 The plaintiffs and the Northern Territory differed about the interaction between s 133AB and s 137. The Northern Territory maintained that s 137 applied to persons arrested under s 123 and taken into custody under s 133AB. It characterised s 137 as imposing an overarching requirement — to bring a person before a justice or a court unless otherwise bailed or released — and characterised that requirement as one which constrained and defined the purpose of the detention. That submission was reinforced by a reference to s 106 of the *Criminal Code* (NT) which creates an offence of delaying the bringing of a person arrested before the courts.

27 The plaintiffs submitted that the Northern Territory's construction should be rejected as it would require the Court to disregard the clear words and statutory purpose of Div 4AA. Moreover, s 137 is expressed to be subject to the provisions of any other Act for taking a person into custody. They pointed to the specific requirement in s 133AB(3)(d) to bring a person before a justice or court under s 137 as an option available to a member of the Police Force at the expiry of the period of detention.

28 The debate between the plaintiffs and the Northern Territory on this question was a rather arid one. Even if s 137(1) did not apply, the common law obligations, which operate in the absence of clear words to the contrary, would require the police officer taking a person into custody under s 133AB to bring that person before a justice of the peace or a court as soon as practicable. That obligation would not be engaged if the person were released unconditionally or

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42 Australia, Law Reform Commission, *Criminal Investigation*, Report No 2, Interim, (1975) at 147 [328].

43 Australia, Law Reform Commission, *Criminal Investigation*, Report No 2, Interim, (1975) at 147–148 [329].

on bail or released and issued with an infringement notice. As a matter of textual analysis of s 133AB, the obligation imposed by the common law and given a statutory form by s 137(1) was not modified by the four hour time limit. That time limit does no more than impose a cap on what is a reasonably practicable time to make a determination about which one of the options under s 133AB(3) is to be exercised. The time limit also constrains the exercise of the questioning power under s 133AB(4) which displaces the questioning power applicable under s 137(2) read with s 138 in the case of taking a person into custody otherwise than pursuant to Div 4AA. So understood the construction of Div 4AA accords with the approach adopted by the Commission that the four hour period which it recommended should be regarded as a maximum rather than the norm.

29 Against that background it is necessary to consider the purpose of Div 4AA in order to determine the character of the custody which it authorises.

Division 4AA — purpose

30 Division 4AA was introduced into the PA Act by the *Police Administration Amendment Act* 2014 (NT). Its function, as described by the Attorney-General and Minister for Justice of the Northern Territory in the Second Reading Speech for the Bill, was[44]:

> "to provide members of the Northern Territory Police Force with an alternative post-arrest option, where a person who has committed certain prescribed offences may be held by police for up to four hours and can then be released with an infringement notice, as opposed to requiring that the person be charged and have those charges be heard by a court."

The Attorney-General and Minister for Justice referred to the concept as "paperless arrest". Its purpose was to provide further flexibility and efficiency in policing work. It would enable police officers to return to their patrol in a more timely fashion, as opposed to being detained for long periods providing necessary paperwork for a court to consider the charges. Just how it would have that effect was not spelt out. On its face there was nothing in the PA Act before the enactment of Div 4AA to prevent a person arrested and taken into custody under s 123 from being released unconditionally, an option contemplated by s 137(1), and issued with an infringement notice pursuant to the *Fines and Penalties (Recovery) Act*. Nevertheless, the Solicitor-General for the Northern

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44 Northern Territory, Legislative Assembly, *Parliamentary Debates — Police Administration Amendment Bill (Serial 98) — presentation and second reading motion* (Hansard), 12th Assembly, Parliamentary Record No 15, 22 October 2014.

Territory submitted that, prior to the amendment, it was unclear whether a person arrested and detained under s 123 could be released and issued with an infringement notice rather than being charged and brought before a court. That concern may illuminate the use of the term "paperless arrest" in the Second Reading Speech.

31 The Attorney-General and Minister for Justice in his Second Reading Speech also made reference to a social control objective, which he described as[45]:

> "An additional benefit to the community is intended by the use of such an option to de-escalate social disorder situations or potential situations of public disorder before they escalate into major incidents."

32 The Northern Territory submitted in this Court that the purpose of custody following arrest was unchanged by Div 4AA. It was to ensure that persons accused of offending are dealt with by the courts, albeit if an infringement notice was issued such a person had the option of expiating the offence by payment of a fine. The period of custody provided for by s 133AB(2) was prescribed for the purpose of enabling police officers to decide how to deal with persons taken into custody under s 133AB. To that end, s 133AB(4) conferred a power to question the person arrested about the offence for which he or she was arrested or any other offence in relation to which the person was of interest to the police.

33 The plaintiffs characterised the custodial period authorised by s 133AB as a "superadded four hour period of detention". All the other options of dealing with a person taken into custody under s 123 remained in place[46]. The only purpose served by the "superadded four hour period of detention" was to postpone a dispositive decision. Where an infringement notice issued at the end of that period the effect of the detention was little short of double punishment. The plaintiffs' submissions, however, relied upon the premise that s 133AB authorised any person taken into custody for an infringement notice offence to be detained for four hours. Section 133AB properly construed, by reference to its purpose, does not have that effect.

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45 Northern Territory, Legislative Assembly, *Parliamentary Debates — Police Administration Amendment Bill (Serial 98) — presentation and second reading motion* (Hansard), 12th Assembly, Parliamentary Record No 15, 22 October 2014.

46 Those options were release; grant of bail; issuing a notice to appear and/or infringement notice; or bringing the person before a justice or court under s 137.

The construction of s 133AB

34 Section 133AB confers a discretionary power exercisable, when a person has been arrested without warrant under s 123, if, and only if, the arrest relates to an infringement notice offence committed, being committed, or about to be committed. Arrest relating to an infringement notice offence does not mean that the person taken into custody can be held for up to four hours at the unfettered discretion of a police officer. As a general proposition there is no such thing as an unfettered statutory power. As Kirby and Callinan JJ said: "No Parliament of Australia could confer absolute power on anyone."[47] Every statutory power, however widely expressed, is confined by the subject matter, scope and purpose of the statute[48]. An official who lawfully takes a person into custody cannot continue to hold that person in custody other than for a purpose authorised by the statute conferring the power.

35 The Northern Territory submitted that the circumstances in which Div 4AA operates are confined to those in which arrest is appropriate, having regard to the need to:

(a) ensure the person is available to be dealt with in respect of an offence if considered appropriate;

(b) preserve public order;

(c) prevent the completion, continuation or repetition of the offence or the commission of another offence;

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47 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 504 [70]; [2002] HCA 22. See also *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 381 per Lord Bingham, 396 per Lord Nicholls, 404 per Lord Hope, 412 per Lord Hutton; *R (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1230 at 1260 [107] per Lord Rodger; [2011] 3 All ER 859 at 891.

48 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 496 per Latham CJ, 505 per Dixon J; [1947] HCA 21; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49; [1979] HCA 62; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368 per Mason J; [1982] HCA 26; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J; [1986] HCA 40; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; [1989] HCA 61; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [22], 84 [31] per Gaudron and Gummow JJ; [1998] HCA 11.

(d) prevent the concealment, loss or destruction of evidence relating to the offence;

(e) prevent the harassment of, or interference with, persons in the vicinity;

(f) prevent the fabrication of evidence in respect of the offence; and/or

(g) preserve the safety or welfare of the public or the person detained.

Those constraints were relied upon to support the contention that detention for the purposes of Div 4AA for a period of up to four hours, or until a person ceased to be intoxicated, was not detention for a penal or punitive purpose. It may be accepted that Div 4AA is confined by those purposes although the applicability of (d) and (f) in the context of infringement notice offences may be questionable.

36 Thus confined in its operation, Div 4AA does not disclose a punitive purpose. To keep a person in custody under Div 4AA in order to punish that person's conduct would be unlawful. An example which demonstrates the point is the arrest under s 123 of a person because an officer believed on reasonable grounds that the person was about to commit an infringement notice offence. Assuming the person not to be intoxicated and no question of any other offences attracting the application of the questioning power under s 133AB(4), it is difficult to see what lawful purpose would be served in detaining that person under Div 4AA for more than the very short time necessary to prevent him or her from committing the offence and to establish his or her identity as required by s 133AC. Assuming no other offence had been committed requiring questioning or investigation, there would be no question of charging or bail or bringing the person before a court. The only option would be unconditional release. No infringement notice could issue in such a case. That application of Div 4AA militates against any suggestion that it authorises an officer to keep a person in custody for four hours regardless of the circumstances.

37 The basis upon which detention may be considered as punitive was considered by this Court in *Chu Kheng Lim v Minister for Immigration*[49]. That consideration was linked to the question whether involuntary detention of any person arriving in Australia without a valid entry permit was punitive and involved the impermissible exercise of the judicial power of the Commonwealth by executive officers of the Immigration Department. In holding that it was not, Brennan, Deane and Dawson JJ acknowledged the general proposition that involuntary detention of a person in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of

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49 (1992) 176 CLR 1; [1992] HCA 64.

adjudging and punishing criminal guilt[50]. Their Honours, however, identified as the most important exception to that general proposition, the arrest and detention in custody of a person accused of a crime to ensure that he or she would be available to be dealt with by the courts. Their Honours said[51]:

> "Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power."

38 The Northern Territory's submission and characterisation should be accepted but with a caveat. If the maximum period for which a person could be held in detention in respect of an infringement notice offence were significantly greater than that specified under s 133AB, then a question might arise as to whether such an extended detention could be justified under any circumstances by reference to purposes of the kind relied upon by the Northern Territory and whether, beyond a certain point, it could still be characterised as administrative rather than punitive. A law authorising the punitive detention by police officers of persons arrested would raise for consideration the plaintiffs' contention that the doctrine of separation of powers, which limits Commonwealth legislative power, applies in the Territory. That question was the subject of submissions to this Court on the premise that Div 4AA authorises punitive detention and thereby purports to confer judicial power on officers of the Police Force. The premise not being established, the question does not arise for determination in this case.

The *Kable* doctrine

39 The plaintiffs submitted that Div 4AA impaired the institutional integrity of the Northern Territory courts contrary to principles laid down in this Court by *Kable* and cases flowing from it. Those decisions have established propositions including the following:

1. A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system[52].

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50 (1992) 176 CLR 1 at 27.

51 (1992) 176 CLR 1 at 28.

52 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J, 116–119 per McHugh J, 127–128 per Gummow J; *Baker v The Queen* (2004) 223 CLR 513 at 519 [5] per Gleeson CJ; [2004]

(Footnote continues on next page)

2. The term "institutional integrity" applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality[53].

3. It is also a defining characteristic of courts that they apply procedural fairness[54] and adhere as a general rule to the open court principle[55] and give reasons for their decisions[56].

4. A State legislature cannot, consistently with Ch III, enact a law which purports to abolish the Supreme Court of the State[57] or excludes any class

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HCA 45; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ; [2004] HCA 46; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] per French CJ and Kiefel J; [2011] HCA 24; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; [2014] HCA 13; *Kuczborski v Queensland* (2014) 89 ALJR 59 at 87–88 [139] per Crennan, Kiefel, Gageler and Keane JJ; 314 ALR 528 at 562–563; [2014] HCA 46; *Duncan v Independent Commission Against Corruption* (2015) 89 ALJR 835 at 840 [16] per French CJ, Kiefel, Bell and Keane JJ; 324 ALR 1 at 6–7; [2015] HCA 32.

53 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]–[64] per Gummow, Hayne and Crennan JJ; [2006] HCA 44; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] per French CJ and Kiefel J.

54 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469–470 per Mason CJ, Dawson and McHugh JJ; [1992] HCA 29; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354–355 [55] per French CJ, 379–380 [141] per Heydon J; [2009] HCA 49; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] per French CJ and Kiefel J; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67] per French CJ, 105 [177], 110 [194] per Gageler J; [2013] HCA 7.

55 *Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; [1976] HCA 23; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208–209 [44] per French CJ and Kiefel J.

56 *Wainohu v New South Wales* (2011) 243 CLR 181.

57 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 per Gaudron J, 111 per McHugh J, 139 per Gummow J; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 543–544 [151]–[153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] per French CJ and Kiefel J.

of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State[58].

5. Nor can a State legislature validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a court[59].

6. A State legislature cannot authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity[60] or which would confer on the court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction[61].

7. A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member[62].

40 It has not been established, and the plaintiffs did not argue, that public confidence in the courts is a touchstone of invalidity. In *Momcilovic v The Queen*[63], Gummow J said that attention to matters of perception and public confidence as distinct and separate sufficient considerations is apt to mislead. There are statements in *Kable* indicating that the jurisdiction conferred on State

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58 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1; *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] per French CJ and Kiefel J.

59 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] per French CJ and Kiefel J.

60 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J; see also at 92–93 [236] per Hayne J; [2010] HCA 39; *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] per French CJ and Kiefel J.

61 *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] per French CJ and Kiefel J.

62 *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [47] per French CJ and Kiefel J.

63 (2011) 245 CLR 1 at 93 [175]; [2011] HCA 34.

courts must not damage public confidence in them[64], but it has been said on many occasions since *Kable* that public confidence is an indicator, but not the touchstone of invalidity; the touchstone of invalidity concerns institutional integrity[65]. That touchstone extends to maintaining the appearance as well as the realities of impartiality and independence of the courts from the executive. Those criteria may be seen as necessary to the maintenance of public confidence in the judicial system. That is not the same as saying that it is necessary or appropriate to use an imputed effect upon "public confidence" to infer that a law impairs the institutional integrity of a court.

41 Courts of the Northern Territory may exercise the judicial power of the Commonwealth in the exercise of jurisdiction conferred upon them by laws made by the Commonwealth Parliament. It follows that *Kable* applies to the Supreme Court of the Territory and to Territory courts as Ch III courts[66]. However, the plaintiffs' contentions did not fall within any of the existing principles developed from that decision and its sequelae. The plaintiffs' complaint did not concern a function or power conferred upon courts of the Territory. Nor did it concern a function or power conferred upon judicial officers of the Territory. Rather they submitted that Div 4AA effects a kind of de facto preclusion of the traditional judicial supervisory function in relation to persons held in involuntary detention.

42 The plaintiffs submitted:

(a) There is no real possibility of a person detained under Div 4AA approaching a court during the period of the detention.

(b) Even if a person detained under Div 4AA were able to make an application to a court, the court would be limited to reviewing the legislative criteria for the detention and thus could not take into account factors it would ordinarily consider when a person detained in custody and not convicted of any crime is brought before it.

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64 See (1996) 189 CLR 51 at 108 per Gaudron J, 118–119 per McHugh J, 133 per Gummow J.

65 See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 618 [102] per Gummow J; *South Australia v Totani* (2010) 242 CLR 1 at 82 [206] per Hayne J.

66 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ and authorities cited therein.

Division 4AA was said to "eviscerate" the court's supervisory power in relation to detention. The plaintiffs' submissions anticipated an argument that a person detained unlawfully pursuant to Div 4AA could bring an action for false imprisonment. That was characterised as a "frail reed" for vindicating the liberty interests of citizens detained under Div 4AA.

43 The plaintiffs' submissions in relation to the application of the *Kable* doctrine were elusive. They seemed to proceed on the premise that Div 4AA did not impose any duty to bring a person arrested before a justice of the peace or a court as soon as practicable after arrest if the person was not earlier released unconditionally or on bail or with an infringement notice. But, for the reasons already given, the relationship between the custodial process and the judicial process under Div 4AA is not materially different from the relationship between the custodial process and the judicial process in relation to an arrest and taking into custody under s 123.

44 It might be possible to envisage a scheme in which power was conferred on the executive in such a way as effectively to deprive the courts of supervision of its exercise. Such a scheme might on established principles, or some extension thereof, be impermissible. But that is not this case. The plaintiffs' argument based on the *Kable* doctrine must fail.

45 It may be observed that in their submissions in support of the Northern Territory, the Solicitors-General for New South Wales and Queensland accepted the proposition that given their view of the *Kable* and *Kirk*[67] principles there would be nothing to prevent a State parliament from investing a police officer with investigative, prosecutorial and punitive functions. Whether such a thing could be done by a State parliament does not fall for determination here. If such a law were enacted in the Northern Territory the question might arise as to whether the conferring on a police officer of a combination of prosecutorial and judicial powers would offend against fundamental common law principles to such an extent that the grant of legislative power to the Northern Territory should not, in the absence of clear words, be construed as extending that far. Given the non-punitive character of the custody which is authorised by s 133AB that question does not arise.

Conclusion

46 For the preceding reasons, the questions in the Special Case should be answered as follows:

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67 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Question 1:

(a) Division 4AA of Pt VII of the *Police Administration Act* (NT) does not confer on the executive of the Northern Territory a power to detain which is penal or punitive in character; it is otherwise unnecessary to answer this question.

(b) No.

Question 2: The plaintiffs.

Question 3: The proceeding should be remitted to a single Justice of this Court for further directions.

GAGELER J.

Introduction

47 This special case, in a proceeding in the original jurisdiction of the High Court, raises questions about the constitutional validity of Div 4AA of Pt VII of the *Police Administration Act* (NT), enacted by the Northern Territory Legislative Assembly in 2014[68]. The Division was explained in the course of its enactment as implementing the "concept of paperless arrests", the underlying policy being "to permit police officers to detain individuals for up to four hours in relation to public order-type offences"[69].

48 Division 4AA authorises a member of the Police Force of the Northern Territory to detain a person whom the member has arrested without warrant on the basis that the member believed that the person had committed, was committing or was about to commit a prescribed offence for which the person might be issued with an infringement notice requiring payment of a specified amount in order to expiate the offence. The authority given to the member is to detain the person, for up to four hours, or for longer if the person is intoxicated.

49 The first plaintiff, North Australian Aboriginal Justice Agency Ltd, provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. The special case contains agreed facts which demonstrate that the vast majority of those detained under Div 4AA in the first quarter of 2015 were Aboriginal or Torres Strait Islander people.

50 The second plaintiff, Ms Bowden, is an Aboriginal person who is resident in the Northern Territory. She was arrested without warrant by a member or members of the Police Force at Katherine, following which she was detained under Div 4AA at the Katherine Police Station from approximately 5.40pm on 19 March 2015 until she was released at 5.20am on 20 March 2015. On release, she was issued with an infringement notice requiring her to pay a total amount of $274.00 in order to expiate offences specified in the notice as using obscene language and indecent behaviour[70] and bringing liquor into a restricted area[71].

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68 *Police Administration Amendment Act* 2014 (NT).

69 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2014.

70 Section 53(1)(a) of the *Summary Offences Act* (NT).

71 Section 75(1) of the *Liquor Act* (NT).

51 Both plaintiffs seek against the Northern Territory of Australia, as defendant, a declaration to the effect that Div 4AA is invalid. The second plaintiff also claims damages for wrongful imprisonment. The defendant takes no issue as to the standing of either plaintiff. The pleadings have closed, but the facts relevant to the wrongful imprisonment claim have not been found and are not fully agreed.

52 The special case raises questions which are agreed by the parties to arise from the relief sought by the plaintiffs. The two substantive questions ask whether Div 4AA is invalid either because it infringes the doctrine of separation of powers enshrined in Ch III of the Constitution or because it impairs the institutional integrity of courts capable of being invested with the judicial power of the Commonwealth.

53 Underlying both questions is an anterior question as to whether the detention authorised by Div 4AA is penal or punitive in character. Informing the answer to that question of characterisation is a threshold question of construction to which it will be necessary immediately to turn after setting out the critical provisions of Div 4AA and locating Div 4AA within its broader legislative context.

Legislation

54 Within Div 4AA of Pt VII of the *Police Administration Act*, the critical operative provision is s 133AB, the first sub-section of which provides:

> "(1) This section applies if:
>
> (a) a member of the Police Force has arrested a person without a warrant under section 123; and
>
> (b) the person was arrested because the member believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence."

There are thus two conditions for the application of the section.

55 The first condition is that a member of the Police Force has arrested a person without a warrant under s 123. Section 123 provides:

> "A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence."

56 The second condition is that the person was arrested because the member believed on reasonable grounds that the person had committed, was committing

or was about to commit an offence that is an "infringement notice offence". That expression is defined for the purpose of Div 4AA to mean an offence under another Northern Territory Act "for which an infringement notice may be served and which is prescribed for [Div 4AA] by regulation"[72].

57 The definition is framed to pick up provisions of other Northern Territory legislation allowing for the service of infringement notices. An infringement notice is a notice to the effect that the person to whom the notice is directed has committed a specified offence and that the person may expiate the offence by paying the penalty specified in the notice. The person served with the notice can elect to pay the penalty within a specified time, in which case the offence is automatically expiated by the payment. Alternatively, the person can elect to have the matter dealt with by a court, in which case proceedings may be taken against the person in respect of the alleged offence as if the infringement notice had not been issued[73].

58 Offences for which infringement notices may be served and which have been prescribed for Div 4AA by regulation, so as to fall within the definition of an "infringement notice offence", comprise specified offences for which a member of the Police Force is able to serve an infringement notice under the *Summary Offences Act*, the *Liquor Act* and the *Misuse of Drugs Act* (NT)[74]. The total number of prescribed offences is 35. They range in seriousness from playing a musical instrument so as to annoy[75] or failing to keep a clean yard[76], to cultivating a prohibited plant[77] or possessing a dangerous drug[78].

59 The penalties for many of those infringement notice offences, if dealt with by a court, are limited to fines. The penalties for others, including the two offences specified in the notice issued to the second plaintiff, extend to imprisonment for a maximum of six months. For the two most serious infringement notice offences, both under the *Misuse of Drugs Act*, the penalty extends to imprisonment for a maximum of two years.

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72 Section 133AA.

73 Division 4 of Pt 2 of the *Fines and Penalties (Recovery) Act* (NT).

74 Regulation 19A of the Police Administration Regulations (NT).

75 Section 76 of the *Summary Offences Act*.

76 Section 78 of the *Summary Offences Act*.

77 Section 7(1) of the *Misuse of Drugs Act*.

78 Section 9(1) of the *Misuse of Drugs Act*.

60 Each infringement notice offence is within the jurisdiction of the Court of Summary Jurisdiction constituted, for the purpose of hearing and adjudication, by a magistrate or by two justices of the peace[79]. A proceeding for such an offence is commenced in the Court of Summary Jurisdiction by the making of a complaint to a justice of the peace or to a magistrate[80], and a party to such a proceeding has a right to appeal from an adjudication of that Court to the Supreme Court of the Northern Territory[81].

61 The two conditions for the application of the section being satisfied whenever a member of the Police Force has arrested a person without a warrant under s 123 for an infringement notice offence, s 133AB goes on to provide:

> "(2) The member may take the person into custody and:
>
> (a) hold the person for a period up to 4 hours; or
>
> (b) if the person is intoxicated – hold the person for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated.
>
> (3) The member, or any other member, on the expiry of the period mentioned in subsection (2), may:
>
> (a) release the person unconditionally; or
>
> (b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or
>
> (c) release the person on bail; or
>
> (d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.
>
> (4) For deciding how to deal with the person under subsection (3), the member, or another member, may question the person about the infringement notice offence, or any other offence in relation to which the person is of interest to police."

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79 Section 43 of the *Justices Act* (NT).

80 Section 49 of the *Justices Act* (NT).

81 Section 163 of the *Justices Act* (NT).

62 The structure is plain enough. Section 133AB(2) authorises the member of the Police Force to detain the person arrested for an infringement notice offence for a period of up to four hours, or longer if the person is intoxicated. Section 133AB(3) gives that member, or another member, four options as to how to deal with that person at the end of the period of detention. Section 133AB(4) authorises that member or another member to question the person for the purpose of determining how to so deal with the person.

63 The four options given to a member of the Police Force under s 133AB(3) need to be examined in turn. The first three involve releasing the person at the end of the period of detention.

64 The first option – releasing the person unconditionally – requires no comment, other than to note that it is the only option which would result in the arrest that has occurred being "paperless".

65 The second option – releasing the person and issuing the person with an infringement notice in relation to the infringement notice offence for which the person has been arrested – involves an exercise of a power conferred on a member of the Police Force by the other Northern Territory legislation which provides for the issuing of an infringement notice for the offence. The issuing of the notice permits the person to elect to pay the specified amount and expiate the offence, or to have the matter dealt with by a court.

66 The third option – releasing the person on bail – involves an exercise of a power conferred on a member of the Police Force by the *Bail Act* (NT). Under the *Bail Act*, release of a person on bail by a member of the Police Force can occur as an alternative to bringing a person before a justice or a court of competent jurisdiction under s 137 of the *Police Administration Act*. It can occur only after the person has been charged[82], and is ordinarily to occur within four hours of the person being charged[83]. Charging a person with an offence requires particulars of the charge to be entered in a Police Station charge book unless it is not practicable for that to occur[84]. Whatever the precise significance of charging a person[85], it must be taken in this context to be a precursor to prosecution for the offence charged in a court.

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82 Section 16 of the *Bail Act*.

83 Section 33(3)(b) of the *Bail Act*.

84 Cf s 116(9) of the *Police Administration Act*.

85 Cf *Japaljarri v Cooke* (1982) 19 NTR 19 at 23.

67 The final option available to a member of the Police Force under s 133AB(3) is described in s 133AB(3)(d) in terms of the member acting under s 137 to bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person. Section 137(1) provides:

> "Without limiting the operation of section 123, but subject to subsections (2) and (3) of this section, a person taken into lawful custody under this or any other Act shall … be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the *Bail Act* or is released from custody."

Sub-sections (2) and (3) allow for a person taken into lawful custody in some circumstances to continue to be held in custody for such period as is reasonable to enable the person to be questioned, or investigations to be carried out to obtain evidence of, or in relation to, an offence which involves the person.

68 For a member of the Police Force to bring a person before a justice or court for an infringement notice offence, or for another offence allegedly committed by the person, is for the member to bring the person before the Court of Summary Jurisdiction and to make a complaint that the person has committed the offence in question. The making of that complaint constitutes the commencement of a proceeding by which the guilt of the person and any punishment for the offence will then be determined by the Court of Summary Jurisdiction, subject to an appeal to the Supreme Court.

69 The evident law enforcement function served by Div 4AA is to be contrasted with the evident protective function served by Div 4. Division 4, which predated Div 4AA, authorises a member of the Police Force to apprehend without warrant a person who the member has reasonable grounds for believing is intoxicated and is either in a public place or trespassing on private land. The member must have reasonable grounds for believing that, because of his or her intoxication, the person: is unable adequately to care for himself or herself and cannot practicably at that time be cared for by someone else; may cause harm to himself or herself or someone else; may intimidate, alarm or cause substantial annoyance to people; or is likely to commit an offence[86]. The person so apprehended can be held in custody for no longer than it reasonably appears that

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86 Section 128 of the *Police Administration Act*.

the person remains intoxicated, and is then to be released[87]. The person is to be neither charged with an offence nor questioned in relation to an offence[88].

Construction

70 The constitutional validity of Div 4AA turns on the character and consequences of the detention authorised by s 133AB(2)(a). The character and consequences of the detention authorised by s 133AB(2)(b) need not be separately considered. That is because no party or intervener argues that s 133AB(2)(b) has a severable operation.

71 The threshold question of construction informing the answer to the question of characterisation concerns the measurement of the period of "up to 4 hours" for which s 133AB(2)(a) authorises the member of the Police Force who has arrested a person for an infringement notice offence to hold that person in custody.

72 The plaintiffs argue that s 133AB(2)(a) authorises the member of the Police Force to hold the person in custody for any period up to a maximum of four hours. Just how long the person is held up to that four hour maximum is for the member to determine.

73 The defendant argues that s 133AB(2)(a) authorises the member of the Police Force to hold the person in custody only for so long as is reasonable for that member or another member to make and to implement a decision to deal with a non-intoxicated person under s 133AB(3). Holding under s 133AB(2) is for the purpose only of dealing with under s 133AB(3). The four hour maximum is a legislative cap on the time that can be regarded as reasonable.

74 The defendant also has an overlapping argument. It is that s 137(1) operates concurrently with s 133AB(2) so as to require that a person who has been arrested and taken into custody for an infringement notice offence be brought before a justice or a court of competent jurisdiction "as soon as is practicable" after having been taken into custody. Section 133AB(2)(a) sets four hours as the upper limit of what can be regarded to be "as soon as is practicable" for the purpose of bringing the person before a justice or a court in compliance with s 137(1). To exercise the last of the options given to a member of the Police Force by s 133AB(3) is to do nothing more than comply with the concurrent requirement of s 137(1). If one of the other options given to a member of the Police Force by s 133AB(3) is to be exercised, that option must likewise be

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87 Section 129 of the *Police Administration Act*.

88 Section 130 of the *Police Administration Act*.

exercised within the same time frame: as soon as practicable, but always within the four hour period.

75 The arguments divide along battlelines not unfamiliar where questions about the constitutional validity of a law are abstracted from questions about the concrete application of that law to determine the rights and liabilities of the parties. The party seeking to challenge validity advances a literal and draconian construction, even though the construction would be detrimental to that party were the law to be held valid. The party seeking to support validity advances a strained but benign construction, even though the construction is less efficacious from the perspective of that party than the literal construction embraced by the challenger. The constructions advanced reflect forensic choices: one designed to maximise the prospect of constitutional invalidity; the other to sidestep, or at least minimise, the prospect of constitutional invalidity. A court should be wary.

76 "If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open."[89] The nature of that mandated choice must not be misunderstood. The choice, where binary, is between two constructions: both of which are reasonably open in the application of ordinary principles of statutory construction; one of which is in opposition to the Constitution, the other of which is in conformity with the Constitution[90]. Questions as to the severance or reading down of otherwise invalid provisions aside[91], a court has no warrant for departing from ordinary principles of statutory construction in pursuit of constitutional validity. And a court has no warrant for preferring one construction of a statutory provision over another merely to avoid constitutional doubt[92].

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89 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28]; [2000] HCA 33.

90 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 504 [71]; [2003] HCA 2.

91 Cf *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 92; [1945] HCA 41. See, relevantly, s 59 of the *Interpretation Act* (NT).

92 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 89 ALJR 382 at 396-397 [65]-[66]; 317 ALR 279 at 295-296; [2015] HCA 7.

77 The approach which a court should adopt was identified and explained in the following statement by French CJ in *International Finance Trust Co Ltd v New South Wales Crime Commission*[93]:

> "The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning."

78 There is a further reason why a court should resist being drawn into adopting a strained meaning of a statute when it is merely to sidestep or minimise the prospect of constitutional invalidity. That reason was well articulated in a recent critique of the practice of construing statutes to avoid constitutional doubt in the Supreme Court of the United States. The reason is that the facility merely to express constitutional doubt as the basis for making a constructional choice "allows judges to articulate constitutional principles in a context where the real impact of those principles – the invalidation of a law – will be unfelt" in a manner that "is anomalous in a case-or-controversy legal system that (ostensibly) abhors advisory opinions". To construe a statute to avoid not a judicial determination of invalidity but a judicially articulated doubt as to validity "is problematic because it unmoors adjudication from the traditional, structural source of judicial restraint"[94].

79 Only if each were reasonably open in the application of ordinary principles of statutory construction could the prospect of constitutional validity or invalidity legitimately bear on the choice between competing constructions;

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93 (2009) 240 CLR 319 at 349 [42]; [2009] HCA 49 (footnote omitted).

94 Katyal and Schmidt, "Active Avoidance: The Modern Supreme Court and Legal Change", (2015) 128 *Harvard Law Review* 2109 at 2112, 2164.

and only then if the court were satisfied that one construction would lead to validity and the other to invalidity.

80 I am unable to accept that the defendant's construction of s 133AB(2)(a) is reasonably open in the application of ordinary principles of statutory construction.

81 The proper construction is to be found in the meaning of the statutory language, read in its statutory context and in light of its statutory purpose. The principle of construction known as the principle of legality is of little assistance given that the evident statutory object is to authorise a deprivation of liberty and that the statutory language in question is squarely addressed to the duration of that deprivation of liberty. The principle "exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law", and "is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed"[95]. The principle provides no licence for a court to adjust the meaning of a legislative restriction on liberty which the court might think to be unwise or ill-considered.

82 Focusing on the statutory language, the defendant's construction involves a distortion, not just of the words of s 133AB(2)(a) but of the opening words of s 133AB(3). The conferral of authority on a member of the Police Force to "hold the person for a period up to 4 hours" is not on its face purposively related to the power of that member or another member to deal with the person. The conferral of authority to deal with the person "on the expiry" of the period of detention rather indicates that the authority to deal with the person is separate from, and sequential to, the authority to detain. What it also indicates is that the expiration of the period of detention must be capable of being ascertained before the authority to deal with arises. The expiration of the period of detention triggers the exercise of the authority to deal with, not the other way round.

83 Looking more broadly to the statutory context, there exists on any view a tension between: the specific authority conferred by s 133AB(2)(a) on a member of the Police Force to detain a person the member has taken into custody after arresting the person without warrant under s 123 for an infringement notice offence; and the general requirement of s 137(1) for any person who is taken into

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95 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310 [313]-[314]; [2013] HCA 39. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37.

custody to be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody. The resolution of that tension necessarily involves determining "which is the leading provision and which the subordinate provision, and which must give way to the other"[96].

84 The natural reconciliation of the two provisions lies in the identification of s 133AB(2)(a) as a specific provision which takes temporal precedence over the general requirement of s 137(1) in relation to a person arrested and taken into custody for an infringement notice offence. The general requirement of s 137(1) has application to such a person only after the period of detention for which s 133AB(2)(a) provides has expired, and only in the event of a member of the Police Force deciding to deal with the person in accordance with the option provided by s 133AB(3)(d). The whole of s 137 then operates in accordance with its terms, ordinarily to require compliance with that requirement by the soonest practicable time after a person is taken into custody, but to permit of extension for such period as is reasonable to enable the person to be questioned or for investigations to be carried out to obtain evidence of, or in relation to, an offence which involves the person.

85 The reconciliation of the two provisions is more problematic on the defendant's construction. On that construction, s 137(1) would always operate in relation to a person arrested and taken into custody for an infringement notice offence so as immediately to require that person to be brought before a justice or a court as soon as practicable after being taken into custody under s 133AB(2). The authority granted by s 133AB(2)(a), to detain the person for up to four hours, would be recast so as to operate as nothing more than a qualification to that requirement of s 137(1). Given that s 137(1) would already have been engaged from the moment of the person having been taken into custody, s 137(1) would not need to be engaged in the event of a member of the Police Force deciding to deal with the person in accordance with the option provided by s 133AB(3)(d). Yet s 137(1) would somehow be disengaged in the event of a member of the Police Force deciding to deal with the person in accordance with any of the other three options provided by s 133AB(3).

86 In interpreting a provision of a Northern Territory Act, including a part of a Northern Territory Act[97], "a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or

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96 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]; [1998] HCA 28.

97 Section 17 of the *Interpretation Act* (NT).

object"[98]. Moreover, in interpreting a provision of a Northern Territory Act, including again a part of such an Act, "if material not forming part of the Act is capable of assisting in ascertaining the meaning of the provision, the material may be considered … to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act"[99]. Extrinsic material "cannot be determinative; it is available as an aid to interpretation"[100]. Extrinsic material does not displace the text but can illuminate the meaning conveyed by the text.

87 The defendant's construction relies on confining the statutory purpose of Div 4AA to the narrow purpose of resolving what is said to be pre-existing ambiguity as to the ability of a member of the Police Force, consistently with s 137, to release a person arrested without warrant under s 123 while issuing an infringement notice to that person. Were that the only purpose, it would be difficult to see why Div 4AA was enacted in such an elaborate form and why s 133AB(2) was enacted at all.

88 The true and much broader purpose of Div 4AA was that spelt out by the Attorney-General for the Northern Territory at the time of the introduction in the Legislative Assembly of the Bill for its enactment. The Attorney-General then said[101]:

> "The purpose ... is to provide members of the Northern Territory Police Force with an alternative post-arrest option, where a person who has committed certain prescribed offences may be held by police for up to four hours and can then be released with an infringement notice, as opposed to requiring that the person be charged and have those charges be heard by a court. I will refer to the concept as 'paperless arrest'.
>
> ... The policy is to permit police officers to detain individuals for up to four hours in relation to public order-type offences, and where an infringement notice may be issued. ...
>
> This alternative post-arrest option will provide further flexibility and efficiency in policing work. The option will enable police officers to

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98 Section 62A of the *Interpretation Act* (NT).

99 Section 62B(1)(a) of the *Interpretation Act* (NT).

100 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; [1987] HCA 12.

101 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2014.

> return to their patrol in a more timely fashion, as opposed to being detained for long periods preparing necessary paperwork for a court to consider the charges. An additional benefit to the community is intended by the use of such an option to de-escalate social disorder situations or potential situations of public disorder before they escalate into major incidents."

89 The Attorney-General went on later during the debate on the Bill in the Legislative Assembly to describe Div 4AA as giving members of the Police Force "a vehicle by which to remove [summary offenders], contain them and then release them"[102]. He described it as "a form of catch and release"[103]. The Attorney-General said[104]:

> "This system simply restores a simple idea that when a police officer arrests a person for a street offence, they have taken that person out of commission. They bring them to the watch house, drop them off at the watch house, write out the summary infringement notice – so it is not entirely paperless – which goes into the property bag of the person who is then placed in the cells for the next four hours. In four hours' time, they come out, collect their property, collect their summary infringement notice, and if they wish to contest the allegations in the summary infringement notice, then there are processes for that to occur. Those processes are explained on the back of the summary infringement notice.
>
> This means the police will no longer become arrest averse. It will actually say to the police that if these clowns are playing up, arrest them, take them into custody, get them out of circulation."

90 The plaintiffs' construction not only fits the statutory language of s 133AB, but fits that identified statutory purpose of Div 4AA. It gives to s 133AB and s 137 a natural sequential operation in relation to persons taken into custody following arrest without warrant for infringement notice offences. It does so by giving s 137 full operation where those persons are dealt with at the expiration of their detention in accordance with s 133AB(3)(d). It should be accepted.

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102 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014.

103 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014.

104 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014.

91 On its proper construction, s 133AB(2)(a) authorises a member of the Police Force to detain a person arrested and taken into custody for an infringement notice offence for any period up to a maximum of four hours. The period of detention, up to that maximum period of four hours, is left to the discretion of the member.

92 That discretion as to the period of detention is not unconfined: undoubtedly, it is to be exercised in good faith and for a proper (that is to say, non-extraneous) purpose[105], which might permissibly be as broad as the maintenance of social order[106]. The discretion is nevertheless undefined. It is not constrained to be exercised so as to ensure that the person is detained only for such time as is reasonable or practicable to enable the person to be brought before a justice or a court of competent jurisdiction or to enable the person to be dealt with in another way permitted by law. Nor is the discretion constrained to be exercised only in a manner which ensures that the detention is protective of the person or of other persons or preventive of harm.

93 It is necessary now to face up to the constitutional consequences of that construction.

Characterisation

94 The starting point for constitutional analysis is the frequently repeated observation in the joint reasons for judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* that, "exceptional cases" aside, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[107]. The observation has its foundation in the concern for the protection of personal liberty lying at the core of our inherited constitutional tradition, which includes the inheritance of the common law. Liberty is "the most elementary and important"[108] of those basic common law rights, which "traditionally, and

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105 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

106 See s 5(2)(a) of the *Police Administration Act*.

107 (1992) 176 CLR 1 at 27; [1992] HCA 64.

108 *Williams v The Queen* (1986) 161 CLR 278 at 292; [1986] HCA 88, quoting *Trobridge v Hardy* (1955) 94 CLR 147 at 152; [1955] HCA 68.

therefore historically, are judged by that independent judiciary which is the bulwark of freedom"[109].

95 The centrality of personal liberty to the functioning of government within our 800 year old inherited tradition was captured in the still frequently cited[110] eighteenth century prose of Sir William Blackstone[111]:

> "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities. ... To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

96 Explaining the protection of personal liberty which the common law provided, Blackstone continued[112]:

> "To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the [gaoler] is not bound to detain the prisoner. For the law judges in this respect ... that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him."

97 The joint reasons in *Lim* specifically acknowledged, as the "most important" of the exceptional cases in which involuntary detention has been accepted not to be penal or punitive in character, "the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts", noting that "the power to detain a person in custody pending trial is ordinarily subject to the supervisory

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109 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11; [1977] HCA 62.

110 Eg *Williams v The Queen* (1986) 161 CLR 278 at 292.

111 Blackstone, *Commentaries on the Laws of England*, (1765), Bk 1 at 131-132.

112 Blackstone, *Commentaries on the Laws of England*, (1765), Bk 1 at 132-133.

jurisdiction of the courts"[113]. The common law facilitated the exercise of that supervisory jurisdiction by imposing a requirement, replicated in s 137(1), that a person arrested be brought before a justice or a court as soon as is practicable after being taken into lawful custody[114].

98 The joint reasons in *Lim* also acknowledged that the exceptional circumstances in which involuntary detention might not be penal or punitive would include cases of detention under mental health legislation and detention under quarantine legislation[115]. Other limited forms of protective or preventive detention might well be envisaged[116]. Cases subsequent to *Lim* have illustrated the difficulty of seeking to draw a bright-line distinction between penal or punitive detention and protective or preventive detention[117]. The difficulty of drawing any distinction between detention which is penal or punitive and detention which is not highlights the significance of default characterisation: any form of detention is penal or punitive unless justified as otherwise. The question is always one of characterisation of the detention, in respect of which the object sought to be achieved by the law authorising detention is a relevant consideration, but not the only consideration.

99 More recent cases indicate that no form of executive detention in the exercise of a statutory power to detain can escape characterisation as punitive unless the duration of that detention meets at least two conditions[118]. The first is that the duration of the detention is reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment. The second is that the duration of the detention is capable of objective determination by a court at any time and from time to time.

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113 (1992) 176 CLR 1 at 28.

114 *Williams v The Queen* (1986) 161 CLR 278 at 292-293.

115 (1992) 176 CLR 1 at 28.

116 Cf Bingham, *The Rule of Law*, (2010) at 71-72.

117 Eg *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; [2004] HCA 49; *Pollentine v Bleijie* (2014) 253 CLR 629; [2014] HCA 30.

118 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [138]-[140]; [2013] HCA 53; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231-232 [25]-[29]; [2014] HCA 34; *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 272 [374]; 316 ALR 1 at 83; [2015] HCA 1.

100 The detention that is authorised by Div 4, of a person who a member of the Police Force has reasonable grounds for believing is intoxicated, can readily be seen to satisfy both of those conditions. So too can the detention that is authorised by s 137(2) or (3), of a person who has been arrested and taken into custody, for such period as is reasonable to enable the person to be questioned, or investigations to be carried out to obtain evidence of, or in relation to, an offence which involves the person.

101 The detention that is authorised by Div 4AA plainly satisfies neither of those conditions. The duration of the detention within the four hour maximum specified in s 133AB(2)(a) is not limited by reference to the time needed to effectuate any identified statutory purpose, and the duration of that detention within the four hour maximum is designedly left to the discretion of a member of the Police Force. The duration of the detention depends on the choice of the member as to how long to take a person out of circulation.

102 Moreover, the detention that is authorised by Div 4AA is detention of a person whom the member of the Police Force has arrested on the basis that the member believed, albeit on reasonable grounds, that the person had committed, was committing or was about to commit an offence. It is a form of detention which results from the member acting not as an accuser but as a judge.

103 This is not an occasion to mince words. The form of executive detention authorised by Div 4AA is punitive. Because it is punitive, the imposition of the detention involves the exercise of a function which our constitutional tradition treats as pertaining exclusively to the exercise of judicial power.

Separation of powers

104 The doctrine of separation of powers enshrined in Ch III of the Constitution has its principal textual anchor in the opening words of s 71. Those words are that "[t]he judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". The doctrine ascribes to those words an allocation of the judicial power of the Commonwealth which is both exclusive and exhaustive. The Parliament of the Commonwealth can vest judicial power of the Commonwealth only in courts referred to in s 71[119], and the Parliament can vest in those courts only judicial

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119 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; [1918] HCA 56.

power of the Commonwealth or power incidental to judicial power of the Commonwealth[120].

105 Division 4AA has not been enacted by the Parliament of the Commonwealth. It has been enacted by the Legislative Assembly in the exercise of a distinct legislative power to make laws for the peace, order and good government of the Territory[121]. That distinct legislative power was conferred on the Legislative Assembly in the exercise by the Parliament of its power under s 122 of the Constitution to "make laws for the government of any territory". The exercise by the Legislative Assembly of that distinct legislative power, although derived from the Parliament, "is not an exercise of the Parliament's legislative power"[122].

106 When they argue that Div 4AA infringes the doctrine of separation of powers enshrined in Ch III of the Constitution, the plaintiffs necessarily argue that the judicial power which is conferred by a law enacted in the exercise of a distinct legislative power conferred by the Parliament under s 122 is judicial power of the Commonwealth.

107 That premise of the plaintiffs' argument was considered and rejected in *Kruger v The Commonwealth*[123]. To a question asking whether a Territory law which authorised executive removal and confinement of persons was invalid on grounds (amongst others) that "it purported to confer judicial power of the Commonwealth ... on persons who were not appointed under or obliged or entitled to exercise the judicial power of the Commonwealth in accordance with Ch III of the Constitution", the formal answer of the Court was "No"[124]. Each of the four Justices constituting the majority who joined in that answer adopted reasoning which involved a rejection of the proposition that judicial power

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120 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10, affirmed in *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529; [1957] AC 288.

121 Section 6 of the *Northern Territory (Self-Government) Act* 1978 (Cth).

122 *Svikart v Stewart* (1994) 181 CLR 548 at 562; [1994] HCA 62, explaining *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; [1992] HCA 51.

123 (1997) 190 CLR 1; [1997] HCA 27.

124 (1997) 190 CLR 1 at 38-39, 176.

invested by a law enacted in the exercise of legislative power conferred under s 122 is judicial power of the Commonwealth[125].

108 The question as now reframed in this special case cannot be approached as if it had not been answered before. What needs to be addressed is not how the question might best be answered if the historical slate were to be wiped clean and the Constitution were to be read anew[126], but whether there is sufficient justification for now reopening, and, if so, departing from the answer already given in, *Kruger*[127].

109 How s 122 relates to Ch III is "a problem of interpretation ... which has vexed judges and commentators since the earliest days of Federation"[128]. "It would have been simple enough ... to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament."[129] Equally, it would have been simple enough to treat s 122 as wholly divorced from Ch III so as to be entirely "disparate and non-federal"[130]. The first of those simple approaches has never commanded assent, and the second (although it acquired early ascendancy[131]) can no longer be accepted in unqualified terms. It has been held, for example, that s 76(ii) operates in conjunction with s 77(i) to permit the Parliament to confer jurisdiction on federal courts in matters arising under laws made under s 122[132]. The jurisdiction conferred on a federal court by a law made by the Parliament can only be federal jurisdiction. And although a negative answer has now repeatedly been given to the question whether a Territory court is a federal court subject to s 72, it has been emphasised that the negative answer

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125 (1997) 190 CLR 1 at 44, 62, 141-142, 170, 176.

126 Cf *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598; [1971] HCA 10.

127 *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 635, 673; [1996] HCA 58.

128 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 331 [6]; [1999] HCA 44.

129 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290.

130 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

131 *R v Bernasconi* (1915) 19 CLR 629; [1915] HCA 13.

132 *Northern Territory v GPAO* (1999) 196 CLR 553; [1999] HCA 8; *Spinks v Prentice* (1999) 198 CLR 511; [1999] HCA 27.

which has so been given is "not to a wide question as to the relationship between Ch III and s 122"[133].

110 The answer given in *Kruger* to the wide question as now reframed in this special case cannot be said to have involved no difference between the reasoning of the justices who constituted the majority, or to have rested on a principle carefully worked out in a succession of cases[134]. On the other hand, there cannot be said to be anything in the cases decided before *Kruger* which lends support to the different answer that the plaintiffs now seek. The plaintiffs fairly acknowledge that two of them, *Spratt v Hermes*[135] and *Capital TV and Appliances Pty Ltd v Falconer*[136], stand against acceptance of that answer.

111 The most significant development to have occurred since *Kruger* has been the recognition in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[137] that Territory courts, no less than State courts, answer the description in s 71 of courts which the Parliament can invest with federal jurisdiction and which are capable of exercising the judicial power of the Commonwealth by reason of that investiture. The result is that federal jurisdiction can be invested by the Parliament in a Territory court under s 122 as well as in a State court under s 77(iii).

112 The plaintiffs seek to go further than *Bradley*. They seek to advance an argument to the effect that all jurisdiction exercised by a Territory court is federal jurisdiction, at least where the matter to be adjudicated concerns rights or liabilities which owe their existence to a law made by the Parliament under s 122. The strongest form of an argument to that effect was developed with conspicuous clarity in the academic writing of Professor Zines[138]. The argument as so developed builds on the settled understanding that the description in s 76(ii) of a matter arising under a law made by the Parliament extends to a matter in which a

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133 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9].

134 Cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438; [1989] HCA 5.

135 (1965) 114 CLR 226; [1965] HCA 66.

136 (1971) 125 CLR 591.

137 (2004) 218 CLR 146; [2004] HCA 31.

138 Zines, *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 177-186.

right or duty in issue owes its existence to a law made by the Parliament[139]. Such an argument would then go on, of necessity, to rely on a more contestable proposition: that a matter is sufficiently described as a matter in federal jurisdiction if the matter answers the description of one or more of the nine matters referred to in ss 75 and 76, irrespective of the source of authority to adjudicate that matter[140].

113 The argument has significant implications for the scope of the appellate jurisdiction of the High Court under s 73 and, in consequence, for whether it might be possible in Territories (although it is impossible in States) to "create islands of power immune from supervision and restraint"[141]. Acceptance of the argument would lead to rejection of the conclusion in *Capital TV and Appliances Pty Ltd v Falconer* that no appeal lies to the High Court from a Territory court under s 73 of the Constitution. Acceptance of the argument would also involve rejection of reasoning in *Spratt v Hermes* to the effect that a Territory court did not exercise federal jurisdiction when it heard a prosecution for an offence against a Commonwealth law at a time before the amendment in 1976[142] of s 68(2) of the *Judiciary Act* 1903 (Cth) specifically to confer federal jurisdiction on Territory courts in the same way as it confers federal jurisdiction on State courts. The argument need not be considered now.

114 The argument, if accepted, would not take the plaintiffs the whole of the distance they need to travel. Section 71, it is to be recalled, relevantly refers to the judicial power of the Commonwealth as being vested in such courts as the *Parliament* invests with federal jurisdiction. To accept that all jurisdiction exercised by a Territory court is federal jurisdiction would not be to accept that all federal jurisdiction exercised by a Territory court is federal jurisdiction vested in that court by the Parliament, so as to involve the exercise of judicial power of the Commonwealth within the meaning of s 71. It therefore would not follow, from acceptance that all jurisdiction exercised by a Territory court is federal jurisdiction, that any judicial power conferred by a Territory law is judicial power of the Commonwealth.

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139 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585-586; [1929] HCA 36; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575; [1983] HCA 31; *Ruhani v Director of Police* (2005) 222 CLR 489; [2005] HCA 42.

140 Cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 589-590 [87].

141 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]; [2010] HCA 1.

142 By the *Judiciary Amendment Act* 1976 (Cth).

115 The reasoning in *Bradley* is in truth opposed to the notion that judicial power conferred by a Territory law is judicial power of the Commonwealth. The first of the propositions accepted in *Bradley* was that "a court of the Territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament"[143]. It was not that a court of the Territory might exercise the judicial power of the Commonwealth pursuant to investment by laws made by a legislature of a Territory. That first proposition then formed the foundation for the holding in *Bradley* that the doctrine associated with *Kable v Director of Public Prosecutions (NSW)*[144] applies to Territory courts in the same way as it applies to State courts. That holding would be redundant if the doctrine of separation of powers were applicable.

116 The actual result in *Bradley* has also removed much of the force of the apparent incongruity of Territory courts being distinct from federal courts, and of Territory judicial power being discrete from Commonwealth judicial power. By equating Territory courts with State courts for the purpose of s 71 of the Constitution, *Bradley* subjects the legislatures of self-governing Territories to the same strictures as Ch III of the Constitution applies to the Parliaments of the States. The result is to afford to citizens resident in Territories the derivative constitutional protection provided by Ch III in no lesser degree than is afforded to citizens resident in States.

117 *Bradley* has stood for more than a decade, and *Kruger* has stood for nearly two decades. Their holdings are consistent. Given that the doctrine of separation of powers has implications for institutional design which extend well beyond considerations of personal liberty, it cannot be said that *Kruger* has achieved no useful result or has led to inconvenience[145]. *Kruger* has been acted on by Territory legislatures to establish institutional structures, blending judicial and non-judicial power, broadly equivalent to those which exist in most States[146].

118 *Kruger* should not be reopened. The legislative power of the Legislative Assembly is not constrained by the doctrine of separation of powers enshrined in Ch III of the Constitution. Division 4AA therefore cannot infringe that doctrine. But that is not the end of the analysis.

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143 (2004) 218 CLR 146 at 163 [28].

144 (1996) 189 CLR 51; [1996] HCA 24.

145 Cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

146 Eg *ACT Civil and Administrative Tribunal Act* 2008 (ACT), *Northern Territory Civil and Administrative Tribunal Act* (NT).

Institutional integrity

119 *Bradley* explained the doctrine associated with *Kable*, in its application to State courts and Territory courts alike, to rest on the proposition "that it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal"[147]. Underlying that proposition is an understanding that "[a] State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth"[148].

120 *Bradley* demonstrated independence and impartiality to be defining characteristics of a court capable of exercising the judicial power of the Commonwealth. Decisions before and after have emphasised that independence and impartiality do not exhaust those defining characteristics. In *Fardon v Attorney-General (Qld)*[149], the essential concern of the doctrine, and the touchstone for its application, was identified as the protection from legislative impairment of the "institutional integrity" of courts: that is to say, the protection of the integrity of courts as institutions established for the administration of justice[150].

121 Thus, as was explained in *Forge v Australian Securities and Investments Commission*[151], with reference to *Kable*, *Fardon* and *Bradley*:

> "[T]he relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court' ... It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."

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147 (2004) 218 CLR 146 at 163 [29].

148 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [183]; [2013] HCA 7.

149 (2004) 223 CLR 575 at 591 [15], 593 [23], 598-599 [37], 617 [101], 648 [198], 655 [219].

150 *Harris v Caladine* (1991) 172 CLR 84 at 92; [1991] HCA 9, explaining *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49; [1982] HCA 13.

151 (2006) 228 CLR 45 at 76 [63]; [2006] HCA 44.

The explanation in *Forge* continued by emphasising that "[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court"[152]. Institutional attributes can too readily be taken for granted until such time as they are seen to come under threat.

122 The principle as explained in *Forge* operates to invalidate a State or Territory law which confers on a State or Territory court "a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction"[153]. Yet the operation of the principle is not confined to invalidating a law by reference to impairment of institutional integrity in the nature or manner of exercise of a power or function which the law confers on a court.

123 Cases in which the principle has been applied to hold State laws invalid have included those in which impairment of the institutional integrity of a court has been seen to arise from the nature of the task which a court was required to perform[154]. They have also included cases in which impairment of the institutional integrity of a court has been seen to arise from the nature of the incidents of a function conferred on a person, rather than a court[155], and by reference to the position in which a court is placed within an overall legislative scheme[156].

124 The cases show that a tendency to undermine public confidence in a court is indicative of a law which impairs the institutional integrity of that court[157]. They show that the character of a law as impairing the institutional integrity of a court can also be indicated by a legislative plan which builds on public confidence in that court to bolster what is essentially legislative or executive

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152 (2006) 228 CLR 45 at 76 [64].

153 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]; [2014] HCA 13.

154 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63], explaining *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 367 [98], 379 [140], 386 [159].

155 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-210 [44]-[47]; [2011] HCA 24.

156 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82], 67 [149], 92-93 [236], 173 [481]; [2010] HCA 39.

157 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617-618 [102].

action, so as metaphorically "to cloak their work in the neutral colors of judicial action"[158].

125 In *Kable* itself, both of those tendencies combined in legislation seen to conscript a court in a legislative plan for the procurement of the continuing imprisonment of an identified individual after the expiration of the sentence which had earlier been imposed by a court for the crime of which he was convicted. The proposition that punitive detention ordinarily exists under our system of government only as a consequence of the judicial adjudication of criminal guilt, as expounded in *Lim*, was reflected in the reasoning of members of the majority in concluding that the institutional integrity of the court was impaired[159].

126 The reasoning in *Kable* was complex. So has been the reasoning in some of the cases which have applied it. Multiple factors have been in the mix.

127 But a doctrine which has its foundation in the protection of the integrity of courts as institutions for the administration of justice need not always be difficult to apply. Not every case is one of complexity. And incompatibility with the institutional integrity of a court can arise quite irrespective of considerations of public confidence.

128 A law which confers a power or function on a court which is "repugnant to the judicial process in a fundamental degree" is a law which is for that reason alone incompatible with the institutional integrity of that court[160]. A law which gives to a court a role in a legislative scheme designed to facilitate punitive executive detention must surely be within the same category. The role is antithetical to the existence of the court as an institution for the administration of justice; repugnant in a fundamental degree to the judicial status.

129 Courts are defined as much by what they don't do as by what they do and how they do it. Implicit in a tradition which reserves punitive detention presumptively to the judicial power is an understanding that punitive detention imposed in the exercise of judicial power is in consequence of adjudication by a court acting in accordance with a judicial process. Part of what sets courts apart

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158 *South Australia v Totani* (2010) 242 CLR 1 at 172 [479].

159 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106-107, 121-122, 131-132. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 611 [77].

160 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 379 [140].

from other institutions within our system of government is that they do not participate in a punitive deprivation of liberty by another arm of government.

130 The plaintiffs place understandable emphasis, in their argument that Div 4AA impairs the institutional integrity of courts of the Northern Territory, on the lack of any involvement on the part of those courts in the instigation or supervision of the detention for which s 133AB(2)(a) provides. Acknowledging that there is no ousting of the jurisdiction of the Supreme Court to ensure that any detention remains within the limits set by s 133AB(2)(a), they emphasise that the detention allowed to occur within those legislated limits is entirely in the exercise of executive discretion.

131 That emphasis is well placed to the extent of highlighting the executive detention authorised by Div 4AA as punitive. For reasons I have already set out at some length, I have concluded that the detention is properly characterised as punitive.

132 That being the character of the detention, the problem with Div 4AA from the perspective of the protection of the institutional integrity of courts of the Northern Territory arises not from those courts being kept out of the process of punitive detention for which s 133AB(2)(a) provides. The problem rather arises from those courts being brought into the further processes which Div 4AA contemplates will occur after that period of punitive detention is over.

133 The constitutional flaw in the design of Div 4AA lies in the role which it gives to Territory courts in the options from which a member of the Police Force must choose under s 133AB(3) when deciding how to deal with the person detained at the end of the period of punitive detention which that member or another member of the Police Force has imposed under s 133AB(2)(a). It is only the first of those options – unconditionally releasing the person in accordance with s 133AB(3)(a) – which does not involve, or cannot give rise to, the commencement of proceedings for the prosecution of that person in the Court of Summary Jurisdiction, with a consequent right to appeal to the Supreme Court. The result of any prosecution which will occur if the person is dealt with under s 133AB(3)(b), (c) or (d) will be an adjudication which determines the criminal liability of the person. Whatever the outcome of that adjudication, the person will already have been punished through the executive detention that has occurred. No subsequent action by a court can change that historical fact.

134 Courts of the Northern Territory are thereby made support players in a scheme the purpose of which is to facilitate punitive executive detention. They are made to stand in the wings during a period when arbitrary executive detention is being played out. They are then ushered onstage to act out the next scene. That role is antithetical to their status as institutions established for the administration of justice.

135 Lest it be thought incongruous that the constitutional defect in a legislative scheme of punitive executive detention is to be found at the periphery of that detention, in the subsidiary role which the legislative scheme gives to courts, it is important to recognise that a constitutional doctrine which limits legislative design has flow-on effects for political accountability. Were the provisions which contemplate a role for courts to be removed, the legislative scheme of Div 4AA would appear to be quite different. The legislative scheme would be starkly one of catch and release. The scheme would be reduced so as to appear on the face of the legislation implementing it to be one which authorises police to detain, and then release, persons arrested without warrant on belief of having committed or having been about to commit an offence. The political choice for the Legislative Assembly would be whether or not to enact a scheme providing for deprivation of liberty in that stark form.

Conclusion

136 The questions asked in the special case should be formally answered as follows:

1. Division 4AA of Pt VII of the *Police Administration Act* (NT) is invalid on the ground that it impairs the institutional integrity of courts of the Northern Territory contrary to Ch III of the Constitution.

2. The defendant should pay the plaintiffs' costs of the special case.

3. There should be a declaration that Div 4AA is invalid. The balance of the matter should be remitted to the Supreme Court of the Northern Territory.

137 KEANE J. The first plaintiff provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. The second plaintiff, Ms Bowden, is an Aboriginal person resident in the Northern Territory. On 19 March 2015, she was arrested in Katherine and held in custody in reliance upon s 133AB(2)(b) of the *Police Administration Act* (NT) ("the Act"). Ms Bowden was held for nearly 12 hours, and was then issued with an infringement notice for two offences, which were stated on the notice as "use obscene/indecent behaviour" and "bring liquor into restricted area".

138 The plaintiffs challenge the validity of Div 4AA of Pt VII of the Act, in which s 133AB is found. They argue that Div 4AA authorises detention by the executive government which is punitive in character and is therefore an exclusively judicial power[161]. On that footing, the plaintiffs advance two arguments against the validity of Div 4AA. The first is that the legislative competence of the Legislative Assembly of the Northern Territory is limited by the separation effected by Ch III of the Commonwealth Constitution between the judicial power of the Commonwealth on the one hand, and the executive and legislative powers of the Commonwealth on the other. The plaintiffs' second argument is that Div 4AA offends the principle in *Kable v Director of Public Prosecutions (NSW)*[162].

The legislation

139 Section 123 of the Act, which predates the commencement of Div 4AA, provides that:

> "A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence."

140 Section 137(1) of the Act also predates the commencement of Div 4AA. It provides generally that a person taken into custody must, as soon as practicable, be brought before a justice or a court. Section 137(2) provides that, notwithstanding this general requirement, a police officer may hold a person in custody for a reasonable period to enable that person to be questioned, or to enable investigations to be carried out, in relation to an offence, whether or not it is the offence in respect of which the person was taken into custody.

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161 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26-29; [1992] HCA 64; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17]; [2004] HCA 49.

162 (1996) 189 CLR 51; [1996] HCA 24.

141 Division 4AA was enacted by the *Police Administration Amendment Act* 2014 (NT) ("the amending Act"), which commenced on 17 December 2014. It provides relevantly as follows:

> "**133AA Definition**
>
> In this Division:
>
> ***infringement notice offence*** means an offence under another Act for which an infringement notice may be served and which is prescribed for this Division by regulation.
>
> **133AB Taking person into custody for infringement notice offence**
>
> (1) This section applies if:
>
> (a) a member of the Police Force has arrested a person without a warrant under section 123; and
>
> (b) the person was arrested because the member believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence.
>
> (2) The member may take the person into custody and:
>
> (a) hold the person for a period up to 4 hours; or
>
> (b) if the person is intoxicated – hold the person for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated.
>
> (3) The member, or any other member, on the expiry of the period mentioned in subsection (2), may:
>
> (a) release the person unconditionally; or
>
> (b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or
>
> (c) release the person on bail; or

(d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

(4) For deciding how to deal with the person under subsection (3), the member, or another member, may question the person about the infringement notice offence, or any other offence in relation to which the person is of interest to police.

133AC When person taken into custody

(1) A member of the Police Force who takes a person into custody under section 133AB, or another member, must establish the person's identity by taking and recording the person's name and further information relevant to the person's identification, including photographs, fingerprints and other biometric identifiers."

142 Regulation 19A of the Police Administration Regulations (NT) was also enacted by the amending Act. It prescribes offences in the following categories as infringement notice offences:

"(a) an offence for which an infringement notice may be served under regulation 3 of the *Summary Offences Regulations*;

(b) a police infringement offence as defined in regulation 7(1) of the *Liquor Regulations*;

(c) an offence as defined in section 20A of the *Misuse of Drugs Act*."

143 A period of detention under s 133AB(2)(a) or (b) of the Act does not preclude the issuing of an infringement notice. There is no express requirement in s 133AB(2)(a) or (b) that the period of detention be used for the purpose of investigating the commission of an offence; whether its operation is impliedly conditional on that purpose poses a difficult question of construction as to the relationship between s 133AB(2) and (3) and s 137(2) of the Act. In particular, there is a question of some difficulty as to whether s 133AB(2) is concerned to fix the outer limits of the reasonable period of questioning and investigation referred to in s 137(2) so that if those activities are not being pursued the authority to detain conferred by s 133AB(2) expires.

The special case

144 The parties agreed to state a number of questions of law for the opinion of this Court in a special case. The questions for determination are as follows:

"Is Division 4AA of Part VII of the [Act] (or any part thereof) invalid on the ground that:

(a) it purports to confer on the executive of the Northern Territory a power to detain which is penal or punitive in character:

a. which, if it had been passed by the Commonwealth Parliament, would be beyond the powers of that Parliament under section 122 of the Constitution, which powers are limited by the separation of powers enshrined in the Constitution; and

b. which is therefore beyond the powers of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth), which powers are subject to the same limits; and/or

(b) it purports to confer on the executive (rather than the courts) of the Northern Territory a power of detention which is penal or punitive in character, thereby undermining or interfering with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution?"

145 The first step in each of the plaintiffs' arguments for the invalidity of the legislation is the proposition that the power conferred by Div 4AA is penal or punitive in character. For the reasons that follow, Div 4AA is not invalid irrespective of whether the power it confers is penal or punitive in character.

146 As to the first of the plaintiffs' arguments, the legislative power of the Legislative Assembly of the Northern Territory is, like the legislative power of the States, unconstrained by the constitutional separation of powers which limits the legislative power of the Commonwealth Parliament in relation to the vesting of the judicial power of the Commonwealth. This conclusion is not altered by the circumstance that s 122 of the Constitution empowered the Commonwealth Parliament to create the Legislative Assembly of the Northern Territory by the enactment of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act").

147 In addition, the courts of the Northern Territory are not creatures of the Commonwealth Parliament; they are creatures of the Legislative Assembly of the Northern Territory. The legislative power of the Legislative Assembly of the Northern Territory derives from Commonwealth legislation enacted pursuant to s 122, and the Commonwealth Parliament has vested some specific judicial functions in the courts of the Northern Territory; but in general, the adjudicative power of the courts and tribunals of the Northern Territory derives immediately and directly from the Legislative Assembly of the Northern Territory. And no

vesting of the judicial power of the Commonwealth in the courts and tribunals of the Northern Territory was, or indeed could be, effected by the Legislative Assembly of the Northern Territory.

148 As to the plaintiffs' second argument, Div 4AA does not affect the functioning or institutional integrity of any court of the Northern Territory, and so does not infringe the principle in *Kable*.

The character of detention under Div 4AA

149 As noted above, the plaintiffs' challenge to the validity of Div 4AA proceeds from characterising the detention which it authorises as punitive. The determination of the character of the detention for which Div 4AA provides depends upon the operation and effect of the law understood in light of its proper construction[163]. One would not ordinarily proceed to a determination of questions of constitutional validity where the case might be resolved on the basis that the impugned law, properly construed, does not have the operation and effect for which the challenger contends[164]. In this case, however, the resolution of the constitutional issues is, on any view, straightforward: it is clear that the plaintiffs' challenge to Div 4AA based on the separation of powers cannot succeed. Accordingly, the concern[165] that legislation not be invalidated unnecessarily where it can be read down is not a reason to leave the constitutional questions until last. Further, because the constitutional issues are readily resolved in light of existing authority, practical considerations of judicial parsimony[166] do not require that the constitutional questions be reached last. And the circumstances that the characterisation argument is not easily resolved and that the difficult issues of statutory construction involved may be better left to a case which is a better vehicle for their resolution provide reason to proceed directly to address the constitutional arguments rather than to seek a final determination of the characterisation issue.

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163 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186-187; [1948] HCA 7; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 152; [1983] HCA 21; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690 at 696 [23]; 309 ALR 29 at 35; [2014] HCA 22.

164 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 117, 186; *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158]; [2004] HCA 39.

165 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 464-465 [56]; [2005] HCA 36.

166 Abraham, *The Judicial Process*, 7th ed (1998) at 403-405.

150 In this regard, the circumstance that a person may have standing to mount a challenge to the validity of a law does not mean that the Court must ignore the possibility that its decision might pre-empt attempts by other persons, more immediately and directly affected by the law, to seek relief based upon a narrower interpretation of the operation and effect of the Act. The relatively liberal rules which prevail in Australia[167] as to the standing necessary to challenge the validity of legislation may give rise to proceedings in which certain arguments are not advanced, notwithstanding that such arguments could conceivably be advanced by individuals with a more immediate or concrete interest in the operation of the legislation. A plaintiff who chooses to pursue a strategy of invalidation of a statute may be disposed to assert that the challenged statute has an expansive operation in order to optimise the prospect that it will be held to have overreached constitutional limits. That may mean that arguments available to other persons affected by the statute, whose interests would be advanced in a practical way by a narrower interpretation of the statute, are pre-empted, without being heard, in the single-minded pursuit by the plaintiff of the constitutional issue.

151 It may well be that in a setting of greater "concrete adverseness which sharpens the presentation of issues"[168] than obtains in the present case, a stronger focus would be brought to bear upon the true operation and effect of Div 4AA than the plaintiffs brought in this case. For example, a person detained under Div 4AA might wish, in a claim for damages for false imprisonment, to plead the absence of investigation by the police of the strength of the case against him or her while in detention as demonstrating that the detention was not for the purposes of investigating an offence. If the true operation of s 133AB is confined to detention for that purpose by its relationship with s 137(2) of the Act, that detention would be beyond the true purpose of the provision. In such a case, the detainee could be expected to urge the narrow view of the operation of Div 4AA, given that it would otherwise be said to interfere with basic common

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167 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530; [1980] HCA 53; *Croome v Tasmania* (1997) 191 CLR 119 at 127, 137; [1997] HCA 5. United States jurisprudence has been more restrictive in its approach to standing: *United States v Students Challenging Regulatory Agency Procedures* 412 US 669 at 686-687 (1973); *Valley Forge Christian College v Americans United for Separation of Church and State Inc* 454 US 464 at 472-473 (1982); *Lujan v Defenders of Wildlife* 504 US 555 at 560-561 (1992); *Steel Co v Citizens for a Better Environment* 523 US 83 (1998). See also Sunstein, "What's Standing after *Lujan*? Of Citizen Suits, 'Injuries', and Article III", (1992) 91 *Michigan Law Review* 163.

168 *Baker v Carr* 369 US 186 at 204 (1962) cited in *Kuczborski v Queensland* (2014) 89 ALJR 59 at 96 [207]; 314 ALR 528 at 574; [2014] HCA 46.

law freedoms[169]. Such a case would be in salutary contrast to the circumstances of the present case, where the plaintiffs have no interest in urging a narrow, rather than an expansive, view of the operation of s 133AB[170]. In this regard, it may be noted that the second plaintiff claims damages for false imprisonment, but only on the basis that s 133AB of the Act is invalid, not on the basis that, on its true operation in the circumstances, it did not authorise her detention for the whole of the period for which she was in fact detained.

152 The defendant advanced a narrow view of the operation of Div 4AA, upon which the detention for which it provides was said to be limited to detention for the purpose of investigating whether to pursue a charge by way of an infringement notice[171]. That the defendant took this stance is not surprising: a party in whose interest it is to defend the constitutional validity of the legislation will naturally be disposed to accept, or indeed to urge, a narrow view of the operation of the legislation in order to optimise the prospects that it will be held to be valid. In the course of later proceedings to enforce the statute, that same party might be disposed to urge a more expansive view.

153 For these reasons, this case is not an ideal vehicle for the resolution of the difficulties of construction which attend the operation of Div 4AA. Those difficulties are compounded by the paucity of agreed facts which might illuminate the operation and effect of the impugned law[172]. On the other hand, as already noted, the constitutional arguments which the plaintiffs advanced do not involve any substantial difficulty. Accordingly, in my respectful opinion, the issue as to the characterisation of the power conferred by Div 4AA would be better left for consideration in a case where its proper construction falls to be resolved in circumstances of greater "concrete adverseness" than obtain here.

154 I turn then, without further ado, to a consideration of the constitutional issues.

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169 *Kuczborski v Queensland* (2014) 89 ALJR 59 at 96 [207]; 314 ALR 528 at 574.

170 *Kuczborski v Queensland* (2014) 89 ALJR 59 at 96 [207]; 314 ALR 528 at 574.

171 cf *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28.

172 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 74-75 [226]-[230]; [2005] HCA 12 applying *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 694; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 416 [279]; [2009] HCA 2.

Section 122 and Ch III of the Constitution

155 Section 122 of the Constitution empowers the Commonwealth Parliament to make laws for the government of Territories. It is relevantly in the following terms:

> "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth".

156 The power of the Legislative Assembly of the Northern Territory to make laws for the peace, order and good government of the Territory was conferred by s 6 of the Self-Government Act, which was, in turn, enacted by the Commonwealth Parliament pursuant to s 122 of the Constitution.

157 The plaintiffs argued that the scope of the law-making power conferred on the Commonwealth Parliament by s 122 is limited by the separation of powers effected by Ch III of the Constitution. As a result, so it was said, the legislative power of the Legislative Assembly of the Northern Territory, created under s 122 by the Commonwealth Parliament in the Self-Government Act, is confined in the same way.

158 The plaintiffs submitted that this is the case because the separation of powers at the Commonwealth level somehow percolates down to the Territories through the exercise of the power conferred by s 122. To explain how this occurred the plaintiffs invoked the metaphor that "the stream cannot rise above its source", the point conveyed being that the Commonwealth Parliament cannot grant legislative power greater than that which it possesses. The metaphor is of little assistance in resolving the issue before the Court.

159 Metaphors may have considerable rhetorical impact; but they are no substitute for legal analysis. For example, as Ms Younan of counsel (who appeared for the Attorney-General of the Australian Capital Territory) pointed out, if the Northern Territory were admitted to Statehood by the Commonwealth under s 121 of the Constitution, it would then, like the existing States, be unaffected by the separation of powers. In such circumstances, the Commonwealth would undoubtedly grant a power "greater", as the plaintiffs' argument would have it, than it possesses itself.

160 It would seem that the metaphor that "the stream cannot rise above its source" was first deployed in discussion of the Constitution by Griffith CJ in *Heiner v Scott*[173] to illustrate the point that the incidental power in s 51(xxxix) of

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173 (1914) 19 CLR 381 at 393; [1914] HCA 82.

the Constitution ("the stream") cannot expand the scope of substantive legislative powers conferred by the other placita of s 51 ("the source"). The use of the stream and source metaphor does not assist in this case because it does not aid an understanding of the nature of power conferred by s 122 of the Constitution, much less explain why it is that s 122, rather than the Legislative Assembly of the Northern Territory, is the source of the power of adjudication exercised by the courts and tribunals of the Northern Territory.

161 There is no good reason to think that the power of the Legislative Assembly to make laws for the peace, order and good government of the Northern Territory is a facsimile of the legislative power of the Commonwealth Parliament conferred by s 122 of the Constitution. Indeed, the plaintiffs' argument that the creation under s 122 of the Constitution of a legislative body carries with it the constraints on Commonwealth legislative power contained in Ch III is contrary to this Court's decision in *Kruger v The Commonwealth*[174]. The plaintiffs invited this Court to reconsider that decision. That invitation should not be accepted.

162 While it is the paramount duty of a Justice of this Court to give effect to the Constitution rather than to earlier interpretations of it[175], the essential constitutional values of certainty, continuity and stability require that, when questions as to the effect of the Constitution have been resolved by determination by this Court, and that determination has helped to shape the life of the nation[176], those questions should not be reopened for no better reason than to allow the re-agitation of arguments which did not prevail in the earlier decision, and which have not, since their rejection, taken on new and compelling force from the experience of the nation and the insights generated by that experience[177].

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174 (1997) 190 CLR 1 esp at 41-44, 53-58, 62, 141-142, 176; [1997] HCA 27.

175 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 70; [1914] HCA 15; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-351 [66].

176 See *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396-397. See also Bryce, *The American Commonwealth*, (1888), vol 1 at 365-366.

177 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279; [1913] HCA 41; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593, 599, 602, 621-630; [1977] HCA 60; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352-353 [70]-[71], 388 [189]. See also *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5; *Williams v The Commonwealth (No 2)* (2014) 88 ALJR 701 at 713 [58]-[60]; 309 ALR 41 at 54-55; [2014] HCA 23.

163 In *Kruger*, the arguments for and against the plaintiffs' contention in this case were fully canvassed in the reasons of the members of the Court. It fell to the Court to resolve those arguments, and that resolution settled the issue. The plaintiffs' argument for the reopening of the issue settled in *Kruger* did not go beyond pointing to dicta in the reasons of the dissenting Justices in *Kruger*[178]; those dicta represent disparate lines of argument which have never, in the history of the federation, commanded the assent of a majority of the Court. With all respect to those who propounded those views, they are no more persuasive now than when they failed to carry the day on earlier occasions.

164 Similarly, there was little point in relying, as the plaintiffs did, upon the considerations adverted to in *Kruger* by Gummow J which tended to favour a view of s 122 different from the settled view; Gummow J himself expressly accepted that "the present state of the authorities" precluded acceptance of a submission that[179]:

> "laws of the Commonwealth … supported by s 122, must comply with the doctrine of the separation of powers found in Ch III of the Constitution."

165 In addition, the powerful considerations of constitutional text and structure which support the decision of the majority in *Kruger* had been summarised in the judgment of Kitto J in *Spratt v Hermes*[180], which was referred to with approval by Brennan CJ in *Kruger*[181]. Kitto J had said:

> "[I]t has been the doctrine of this Court for fifty years, consistently maintained notwithstanding criticism, that Ch III is directed to a limited topic and accordingly has a limited application. The doctrine arises from a consideration of the framework of the Constitution and from many indications, to be found by working through the *Constitution Act* (63 and 64 Vict c 12) and the Constitution itself, that the first five Chapters of the Constitution belong to a special universe of discourse, namely that of the creation and the working of a federation of States, with all the safeguards, inducements, checks and balances that had to be negotiated and carefully expressed in order to secure the assent of the peoples of the several Colonies, with their divers interests, sentiments, prejudices, ambitions and apprehensions, to unite in the federation. When Ch VI is reached, and it is found that s 122 gives the Parliament a general power to make laws for the

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178 (1997) 190 CLR 1 at 80-84, 118-121.

179 (1997) 190 CLR 1 at 176.

180 (1965) 114 CLR 226 at 250; [1965] HCA 66.

181 (1997) 190 CLR 1 at 44.

> government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed under the authority of the Commonwealth or otherwise acquired by it, a change to a fundamentally different topic is perceived. The change is from provisions for the self-government of the new federal polity to a provision for the government by that polity of any community which comes under its authority while not being 'a part of the Commonwealth'[182]."

166 These considerations of constitutional text and structure securely undergird the Court's decision in *Kruger*. In contrast, the arguments of the plaintiffs appeal to a vague notion of symmetry as requiring that the power exercised by the courts of the Northern Territory be subject to the same limits as that exercised by the courts of the Commonwealth; but this line of argument fails to recognise that the governmental institutions of the Territories have never been thought to be miniature versions of their Commonwealth counterparts.

167 The Territories are dependencies of the Commonwealth, not small-scale versions of it, or participants in the federal compact between the Commonwealth and the States[183]. A wide range of Territories may be administered by the Commonwealth under s 122. No distinction is made between Territories which are internal and those which are external. They may be remote and sparsely populated island communities, or regions of uncertain political stability. The notion that the arrangements for the government of each of such disparate dependencies must mirror those applicable to the Commonwealth has nothing to commend it. It is at odds with the long-accepted understanding that s 122 is a source of power to be exercised by the Commonwealth with all the flexibility necessary to deal with the particular needs of Territories with different political circumstances[184]. The plaintiffs' appeal to the notion of symmetry derives no support from authority; that is not surprising given that the idea derives no support from the text or structure of the Constitution.

168 In addition, it is well settled that the separation of powers effected at the level of the Commonwealth by Ch III of the Constitution does not require the

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182 cf Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 589.

183 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290; [1956] HCA 10; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

184 *R v Bernasconi* (1915) 19 CLR 629 at 637-638; [1915] HCA 13; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 42-43.

separation of powers at the level of the States[185]. The plaintiffs sought to appeal to the desirability of securing the rights of individuals against executive detention[186], but their argument did not explain why residents of the Territories should be in a better position in relation to immunity against executive detention than residents of the States. The absence of such an explanation is a telling deficit in the plaintiffs' argument, especially given that greater flexibility would be expected in relation to the governmental arrangements thought to be expedient for Territories (which have not yet reached the political maturity recognised by, and reflected in, the grant of Statehood) than in relation to the States, which are, unlike the Territories[187], participants in the federal compact established by the Constitution.

169 Finally on this point, the disruption and instability which would be caused by reopening *Kruger* militates powerfully against acceptance of the plaintiffs' invitation to reopen it. The Legislative Assembly of the Northern Territory has created a number of courts and tribunals. Some of them exercise both judicial and non-judicial functions, and some of them do not conform to the requirements for appointment to judicial office found in s 72 of the Constitution[188]. To hold

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185 *Gilbertson v South Australia* [1978] AC 772 at 783; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 381, 401, 409-412; *Mabo v Queensland* (1988) 166 CLR 186 at 202; [1988] HCA 69; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96-98, 99-105, 111-119; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [13]-[14]; [1998] HCA 54.

186 cf *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-29.

187 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

188 Courts include the Local Court (see the *Local Court Act* (NT), the *Small Claims Act* (NT) and the *Care and Protection of Children Act* (NT)), the Court of Summary Jurisdiction (see the *Justices Act* (NT), Pt IV, Div 1), the Work Health Court (see the *Work Health Administration Act* (NT) and the *Return to Work Act* (NT)) and the Youth Justice Court (see the *Youth Justice Act* (NT)). Tribunals include the Alcohol Mandatory Treatment Tribunal (see the *Alcohol Mandatory Treatment Act* (NT)), the Northern Territory Civil and Administrative Tribunal (see the *Northern Territory Civil and Administrative Tribunal Act* (NT)), the Lands, Planning and Mining Tribunal (see the former *Lands, Planning and Mining Tribunal Act* (NT)), the Northern Territory Licensing Commission (see the former

(Footnote continues on next page)

that the legislative power of the Legislative Assembly of the Northern Territory is limited by Ch III of the Constitution would invalidate decisions of the Northern Territory courts and tribunals which exercise both judicial and executive functions and for which the terms of appointment do not conform to s 72 of the Constitution[189].

170 In any event, the Territory's courts and tribunals were created, not by the Commonwealth Parliament exercising the power conferred by s 122 of the Constitution, but by the direct exercise of the legislative power of the Legislative Assembly of the Northern Territory. In *Capital Duplicators Pty Ltd v Australian Capital Territory*[190], it was held by majority that s 122 of the Constitution allowed the Commonwealth Parliament to create a legislature for a Territory empowered to make laws for the peace, order and good government of the Territory. As Barwick CJ had said in *Spratt v Hermes*[191], the power conferred by s 122 is a legislative power "as large and universal … as can be granted." The cases upon which the majority in *Capital Duplicators* based their conclusion were cases which emphasised the plenary and independent character of the law-making power of self-governing colonies established by the Imperial Parliament at Westminster[192].

171 The enactment of the Self-Government Act did not effect a delegation of the law-making power of the Commonwealth to the Legislative Assembly of the Northern Territory. The law-making power conferred by the Self-Government Act is an independent and unqualified law-making power. The Northern Territory Legislative Assembly is not responsible to the Commonwealth or to the Commonwealth Parliament for the manner in which its legislative power is exercised. In this regard, in *Capital Duplicators*[193], Brennan, Deane and Toohey JJ observed, with the concurrence of Gaudron J[194], that the Legislative Assembly of the Australian Capital Territory "has been erected to exercise not

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Northern Territory Licensing Commission Act (NT) and the *Liquor Act* (NT)) and the Agents Licensing Board (see the *Agents Licensing Act* (NT)).

189 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 66-67.

190 (1992) 177 CLR 248 esp at 280-283, 284; [1992] HCA 51.

191 (1965) 114 CLR 226 at 242.

192 (1992) 177 CLR 248 at 280-283.

193 (1992) 177 CLR 248 at 282.

194 (1992) 177 CLR 248 at 284.

the [Commonwealth] Parliament's powers but its own". And in *Svikart v Stewart*[195], this Court confirmed that the Territory legislature:

> "must be regarded as a body separate from the Commonwealth Parliament, so that the exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power."

The judicial power of the Commonwealth

172 The plaintiffs put their argument in relation to the separation of powers in another way, arguing that the courts of the Northern Territory are "always and only" exercising federal jurisdiction, either directly when applying federal legislation, or indirectly when applying laws that derive from the Self-Government Act and, ultimately, from s 122. This argument cannot be sustained.

173 The courts of the Northern Territory are not federal courts created by the Commonwealth Parliament within the meaning of s 71 of the Constitution[196], and their enforcement of Div 4AA does not involve any exercise of federal jurisdiction invested pursuant to a law made by the Commonwealth Parliament under s 122 of the Constitution. Northern Territory courts can and do exercise the judicial power of the Commonwealth pursuant to laws made by the Commonwealth Parliament[197], but that is not all they do. It is well settled that Territory courts are not "such … federal courts as the Parliament creates" within s 71 of the Constitution, nor courts "created by the Parliament" within s 72 of the Constitution. The courts of the Northern Territory exercise the judicial power of

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195 (1994) 181 CLR 548 at 562; [1994] HCA 62. See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 352-353 [79]-[80]; [1999] HCA 44.

196 *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591; [1971] HCA 10; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332-333 [9], 340-341 [35]-[37], 348 [63], 349 [67], 353 [81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163-164 [31]; [2004] HCA 31.

197 *Northern Territory v GPAO* (1999) 196 CLR 553 at 590-591 [88]-[89], 605 [131]; [1999] HCA 8; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 565 [82], 595-596 [175], 636 [312]; [1999] HCA 27; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 339-340 [33], 347-348 [62]-[63], 348-349 [66]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81]; [2000] HCA 63; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[30].

the Commonwealth only to the extent that it is expressly vested in them by the Commonwealth Parliament pursuant to a law made under s 122 of the Constitution.

174 The plaintiffs' argument that all judicial power exercised in the Northern Territory is necessarily the judicial power of the Commonwealth cannot stand with the decisions of this Court in *Spratt v Hermes*[198] and *Capital TV and Appliances Pty Ltd v Falconer*[199]. In the former, it was held in relation to the Australian Capital Territory that the requirements of s 72 of the Constitution for the appointment of the federal judiciary do not limit the Commonwealth Parliament's power to make laws under s 122 for judicial appointments in the Territory. In the latter it was held that the Supreme Court of the Australian Capital Territory is not a "federal court" or a "court exercising federal jurisdiction". The plaintiffs sought leave to reopen these cases. That leave should not be granted.

175 The authority of *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer* is of long standing, and the apparatus of government of the Northern Territory and the Australian Capital Territory have been established on the foundation for which those decisions stand as authority. Great instability would be occasioned if they were now to be set aside. A moment's reflection upon the ramifications of the plaintiffs' argument that the Legislative Assembly of the Northern Territory had purported to vest the judicial power of the Commonwealth in the courts of the Northern Territory suffices to illustrate the extent of the disruption which would ensue from its acceptance.

176 Only the Commonwealth Parliament can invest the judicial power of the Commonwealth in a court. Section 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in this Court, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. It denies all possibility that some other organ might effect the vesting of the judicial power of the Commonwealth, or that such power might be vested in a court other than those specified. In *R v Kirby; Ex parte Boilermakers' Society of Australia*[200], Dixon CJ, McTiernan, Fullagar and Kitto JJ said that:

> "[T]o study Ch III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature

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198 (1965) 114 CLR 226 esp at 242-243, 251, 260-261, 266, 278, 282.

199 (1971) 125 CLR 591.

200 (1956) 94 CLR 254 at 270.

> puts out of question the possibility that the legislature may be at liberty to turn away from Ch III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia."

177 This passage emphasises the powerful negative implication in Ch III of the Constitution. The exclusive provision made by s 71 of the Constitution, and the safeguards afforded by s 72, are essential appurtenances of the federal compact, in that they assure the States, as participants in that compact, that the adjudication by the federal judiciary of controversies affecting their interests will not be influenced by the political branches of the Commonwealth government[201].

178 The plaintiffs did not identify any statutory language used by the Legislative Assembly of the Northern Territory to create the Territory's courts and tribunals which might suggest that it was purporting to vest the judicial power of the Commonwealth in any of those courts or tribunals. Rather, the plaintiffs' contention was that such a vesting was unavoidable because the judicial power of the Northern Territory is an anabranch of the stream of judicial power flowing from the Constitution. And so, like Molière's *Bourgeois Gentilhomme*, who spoke prose without knowing it, the Northern Territory Legislative Assembly seems to have vested the judicial power of the Commonwealth in the Territory's courts without knowing that it was doing so. Once again, the dangers of reasoning by metaphor become apparent. If it were indeed the case that the Northern Territory Legislative Assembly had purported to vest the judicial power of the Commonwealth in the courts and tribunals of the Territory, the attempt would have been futile. No federal jurisdiction at all could have been validly vested in those courts and tribunals, and their judgments or orders would be void or susceptible to being avoided.

179 In truth, of course, it was the legislative power of the Northern Territory Legislative Assembly, not the legislative power of the Commonwealth Parliament, which was exercised in enacting Div 4AA and the power which was conferred thereby, whatever its true character, was not the judicial power of the Commonwealth, but a power within the grant of the Legislative Assembly. As noted above, the Legislative Assembly was established by the Commonwealth Parliament to exercise not the legislative power of the Commonwealth Parliament, but its own[202].

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201 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268, 276, 296.

202 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 265-266, 282.

180 Finally, and for the sake of completeness, it may be said that the plaintiffs' argument to reopen *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer* gains no force by referring, as the plaintiffs did, to the observation by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *Boilermakers*[203] that:

> "It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament."

181 Before their Honours made this observation, they acknowledged[204] that: "It has been decided that the courts of the Territories falling under s 122 are not governed by the judicature provisions" of Ch III. And after the observation on which the plaintiffs sought to rely, their Honours went on to explain[205] that "an entirely different interpretation has been adopted", being an interpretation which "brings its own difficulties", but which "finds support in the course adopted in the United States in relation to the analogous" provisions of the United States Constitution. Read in its context, the passage on which the plaintiffs sought to rely was not opening up a path different from that which had been taken; rather, it was recording their Honours' acknowledgment that that path had been decisively closed[206].

Kable

182 It is because the separation of powers arguments cannot avail the plaintiffs that they were driven to rely upon the principle in *Kable*, which has been applied to the Territories as well as the States[207].

183 As was said in *Attorney-General (NT) v Emmerson*[208], *Kable* stands for the proposition that in relation to courts which may exercise federal jurisdiction:

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203 (1956) 94 CLR 254 at 290.

204 (1956) 94 CLR 254 at 289.

205 (1956) 94 CLR 254 at 290.

206 cf *Spratt v Hermes* (1965) 114 CLR 226 at 250.

207 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[30]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 228-229 [105]; [2011] HCA 24.

208 (2014) 253 CLR 393 at 424 [40]; [2014] HCA 13.

> "State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid." (footnote omitted)

184 The plaintiffs recognised that the *Kable* principle is typically concerned with situations where a particular function that is apt to impair the court's institutional integrity has been conferred on a court. It was submitted, however, that the principle extends to situations where the legislative intrusion takes the form of a usurping or undermining of the courts. The plaintiffs relied, in this regard, upon the observation of French CJ in *International Finance Trust Co Ltd v New South Wales Crime Commission*[209] that the institutional integrity of the courts may be impaired by depriving a court of "an important characteristic of judicial power."

185 It must be said immediately that the plaintiffs' contention misconceives the effect of his Honour's statement. French CJ was speaking of laws which directly affect the actual functioning of the courts. In *Kuczborski v Queensland*[210], Crennan, Kiefel, Gageler and Keane JJ observed that the principle for which *Kable* stands "depends on the effect of the law upon the functioning of the courts." The *Kable* principle is concerned to maintain the institutional integrity of institutions vested with federal judicial responsibility. It applies where the impugned legislation purports to enlist the court in the implementation of legislative or executive policies[211]; or where the impugned legislation purports to require the court, in the exercise of its functions, to depart significantly from the methods and standards which have historically characterised the exercise of judicial power[212].

186 Division 4AA invests a power in the executive government of the Northern Territory. It does not operate to "enlist" any court to do the work of the

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209 (2009) 240 CLR 319 at 355 [55]; [2009] HCA 49.

210 (2014) 89 ALJR 59 at 99 [231]; 314 ALR 528 at 579.

211 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82], 67 [149], 92-93 [236], 173 [481]; [2010] HCA 39; *Kuczborski v Queensland* (2014) 89 ALJR 59 at 88 [140]; 314 ALR 528 at 563.

212 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]; [2006] HCA 44; *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111]; [2007] HCA 33; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 353-354 [52]; *South Australia v Totani* (2010) 242 CLR 1 at 63 [131], 157 [427]; *Kuczborski v Queensland* (2014) 89 ALJR 59 at 88 [140]; 314 ALR 528 at 563.

executive government, much less require it, nor must a court depart from the processes which characterise the judicial process. Division 4AA is not directed at the courts: it does not add to or deprive any court of any function or characteristic of judicial power. It does not direct a court as to the exercise of its functions; in particular, it is not legislation which "prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly."[213]

187 To the extent that the plaintiffs argued that Div 4AA adversely affects the courts by effectively sidelining them in respect of the matters for which it provides, the plaintiffs' argument confuses the *Kable* principle with the requirements of the constitutional separation of powers at the level of the Commonwealth. Their argument on this point is, in truth, a complaint that functions which ought to be performed by the judiciary are being performed by the executive. That is a complaint about a failure to observe the requirements of the separation of powers. It is not a complaint which engages the *Kable* principle.

188 The plaintiffs also argued that Div 4AA deprives the courts of the Northern Territory of their supervisory jurisdiction because it denies judicial oversight of the period of detention under s 133AB(2). But to the extent that the powers conferred on the executive government may be exercised unlawfully, judicial remedies for unlawful administrative action are available to those adversely affected by such unlawful action. The plaintiffs' argument here is no stronger than their argument that the powers conferred by Div 4AA cannot lawfully be conferred by the Legislative Assembly of the Northern Territory, and it should be rejected for the same reasons.

Conclusion

189 The questions posed by the special case should be answered as follows:

1. Division 4AA of Pt VII of the *Police Administration Act* (NT) is not invalid, irrespective of whether it confers a power to detain which is penal or punitive in character:

    (a) it is not beyond the powers of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act* 1978 (Cth) by reason of the separation of powers enshrined in the Constitution; and

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213 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470 (footnote omitted); [1992] HCA 29; *Kuczborski v Queensland* (2014) 89 ALJR 59 at 100 [233]-[235]; 314 ALR 528 at 579-580.

(b) it does not undermine or interfere with the institutional integrity of the courts of the Northern Territory in a manner contrary to the Constitution.

2. The plaintiffs.

3. The proceeding should be remitted for further directions by a single Justice of this Court.

190 NETTLE AND GORDON JJ. This special case raises the question of whether any of the provisions of Div 4AA of Pt VII of the *Police Administration Act* (NT) are invalid. The Division deals with the powers of members of the Northern Territory Police Force ("police officers") to arrest and take into custody persons in relation to what are called "infringement notice offences".

191 The plaintiffs contended that Div 4AA purports to confer on the executive of the Northern Territory a power to detain that is penal or punitive in nature, which is quintessentially a judicial power. It was submitted that, just as the doctrine of the separation of powers limits the Commonwealth's legislative powers under s 51 of the Constitution such that judicial power cannot be conferred on Commonwealth executive officers, it should be held that the Commonwealth lacks power under s 122 of the Constitution to empower Territory legislatures to confer judicial power on Territory executive officers. It follows, the plaintiffs said, that the Legislative Assembly of the Northern Territory lacked power to enact Div 4AA.

192 In the alternative, the plaintiffs submitted that Div 4AA undermines the institutional integrity of the courts of the Northern Territory by removing or limiting judicial oversight during the period of detention, and thus that the Division is invalid in accordance with the doctrine established in *Kable v Director of Public Prosecutions (NSW)*[214] and subsequent decisions of this Court, including *Kirk v Industrial Court (NSW)*[215].

193 The defendant argued to the contrary that, upon its proper construction, the powers conferred by Div 4AA are not penal or punitive and, therefore, that the question of whether the separation of judicial power mandated by Ch III of the Constitution applies in relation to s 122 does not arise.

194 For the reasons which follow, it should be concluded that, upon the proper construction of Div 4AA, the powers which it confers on police officers are not penal or punitive and they do not detract from the institutional integrity of the Territory courts. Consequently, no question arises as to the scope of s 122 of the Constitution and its relationship with Ch III.

The facts and the proceedings

195 The first plaintiff is a company limited by guarantee which provides legal services to Aboriginal and Torres Strait Islander people in the Northern Territory. The second plaintiff is an Indigenous woman who lives in the Northern Territory.

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214 (1996) 189 CLR 51; [1996] HCA 24.

215 (2010) 239 CLR 531; [2010] HCA 1.

On the evening of 19 March 2015, she was arrested by police officers in Katherine and taken into custody, purportedly pursuant to s 133AB(2)(b) of the *Police Administration Act*. She was held at the Katherine Police Station for approximately 12 hours and was released at 5:20am on 20 March 2015. A police officer issued the second plaintiff with an infringement notice which alleged, first, that she had used obscene or indecent behaviour and, secondly, that she had brought liquor into a restricted area. The notice stated that a fine of $274 was payable to expiate the offences.

196 The plaintiffs commenced proceedings in the original jurisdiction of this Court. The first plaintiff claims, inter alia, a declaration that Div 4AA is invalid. The second plaintiff claims, inter alia, a declaration that, by reason of the invalidity of Div 4AA, her detention on 19 and 20 March 2015 constituted false imprisonment or, alternatively, that it otherwise had no lawful basis. She also claims damages for the imprisonment, which, it is contended, was unlawful.

197 The parties agreed to state questions of law for the opinion of the Full Court in the form of a special case. In brief substance, question 1(a) asks whether Div 4AA is invalid on the ground that it purports to confer a power to detain which is penal or punitive in character and is thus beyond the powers of the Legislative Assembly of the Northern Territory by virtue of the limits imposed on the Commonwealth's legislative power under s 122 of the Constitution by Ch III. Question 1(b) asks whether Div 4AA is invalid because it undermines the institutional integrity of the courts of the Northern Territory. Question 2 deals with costs and question 3 concerns orders to dispose of the balance of the proceeding.

The legislative provisions

198 Division 3 of Pt VII of the *Police Administration Act*, which is comprised of ss 121-127, provides for the arrest of persons suspected of committing, having committed or being about to commit an offence. Sections 121 and 122 provide for the issue of arrest warrants. Section 123 provides for arrest without warrant of a person who a police officer believes on reasonable grounds has committed, is committing or is about to commit an offence. Sections 124 and 126 provide for arrest where a warrant has been issued. Section 125 provides for the arrest of interstate offenders. Section 127 provides for the information which a police officer must give to a person who is arrested.

199 Division 6 of Pt VII, which is comprised of ss 136-138B, provides for a person who has been taken into custody under the Act or any other Act to be brought before a justice or a court. Principally among those provisions, s 137 provides as follows:

"(1) Without limiting the operation of section 123, but subject to subsections (2) and (3) of this section, a person taken into lawful custody under this or any other Act shall (subject to that Act where taken into custody under another Act) be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the *Bail Act* [(NT)] or is released from custody.

(2) Notwithstanding any other law in force in the Territory (including the common law), but subject to subsection (3) a member of the Police Force may, for a reasonable period, continue to hold a person he has taken into lawful custody in custody to enable:

(a) the person to be questioned; or

(b) investigations to be carried out,

to obtain evidence of or in relation to an offence that the member believes on reasonable grounds involves the person, whether or not:

(c) it is the offence in respect of which the person was taken into custody; or

(d) the offence was committed in the Territory,

and the person shall not be granted bail under Part III or section 33 of the *Bail Act* while so detained, whether or not he or she has been charged with an offence.

(3) A member of the Police Force may continue to hold a person under subsection (2) for the purposes of enabling the person to be questioned or investigations to be carried out to obtain evidence of or in relation to:

(a) the offence in respect of which the person was taken into custody, only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for any period; or

(b) an offence that is not the offence in respect of which the person was taken into custody, only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for 5 years or more."

200 Section 138 directs that, in determining what is a reasonable period for the purposes of s 137(2), a specified range of considerations are to be taken into account and s 138A provides for that time to be extended where the person brought into custody is intoxicated.

201 In 2014, the Act was amended by the *Police Administration Amendment Act* 2014 (NT). Among other things, it provided for the insertion[216] of Div 4AA (ss 133AA-133AC), which is directed to a particular class of offence called an "infringement notice offence", into Pt VII. Section 133AA defines an infringement notice offence as "an offence under another Act for which an infringement notice may be served and which is prescribed for this Division by regulation". By and large, the offences prescribed[217] as infringement notice offences are of a relatively minor nature[218]. Section 133AB provides for the taking into custody of a person whom a police officer has arrested in relation to an infringement notice offence:

> "(1) This section applies if:
>
> (a) a member of the Police Force has arrested a person without a warrant under section 123; and
>
> (b) the person was arrested because the member believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence.
>
> (2) The member may take the person into custody and:
>
> (a) hold the person for a period up to 4 hours; or
>
> (b) if the person is intoxicated – hold the person for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated.
>
> (3) The member, or any other member, on the expiry of the period mentioned in subsection (2), may:
>
> (a) release the person unconditionally; or

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216 *Police Administration Amendment Act*, s 7.

217 Police Administration Regulations (NT), reg 19A.

218 See, eg, Summary Offences Regulations (NT), regs 3 and 4A.

(b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or

(c) release the person on bail; or

(d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

(4) For deciding how to deal with the person under subsection (3), the member, or another member, may question the person about the infringement notice offence, or any other offence in relation to which the person is of interest to police."

202 Section 133AC provides, in summary, that a police officer who takes a person into custody under s 133AB must take certain personal identification details from the person and may search the person and take from him or her valuables for safekeeping or contraband for disposal.

203 The issue of an infringement notice engages certain provisions of the *Fines and Penalties (Recovery) Act* (NT). A person who is issued an infringement notice becomes liable to pay a sum of money specified on the notice[219]. If the payment is made, the alleged offence is expiated and no further proceedings can be taken in relation to the offence[220]. Rather than expiating the offence, the person may elect to have the offence dealt with by a court[221], and, if a person so elects, proceedings may be commenced in respect of the offence as if the infringement notice had not been issued[222].

Competing constructions of Div 4AA

204 The plaintiffs argued that, by providing for a person arrested for an infringement notice offence to be detained for a period of up to four hours, s 133AB(2)(a) purports to authorise police officers to detain that person beyond the point where it first becomes practicable to take the person before a justice or court in accordance with s 137(1) and thus purports to confer judicial power on police officers.

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219 *Fines and Penalties (Recovery) Act*, ss 9, 12.

220 *Fines and Penalties (Recovery) Act*, s 13.

221 *Fines and Penalties (Recovery) Act*, s 21.

222 *Fines and Penalties (Recovery) Act*, s 22.

205 The defendant contended that, upon its proper construction, Div 4AA is to be read as subject to Div 6 and, therefore, that the period of up to four hours specified in s 133AB(2)(a) is to be read as subject to the requirement under s 137(1) that a person arrested for an offence under s 123 be taken before a justice or court as soon as practicable after being taken into custody unless sooner released or granted bail.

The operation of ss 133AB and 137

206 The starting point for the engagement of ss 133AB and 137 is an arrest under s 123 upon a belief on reasonable grounds that a person has committed, is committing or is about to commit "an offence". Upon arrest, s 123 empowers police officers to take the person into custody. The person is thus "taken into lawful custody under this ... Act" within the meaning of s 137(1).

207 Section 137(1) imposes a duty on police officers in respect of a person taken into lawful custody under the Act: the person "shall ... be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail ... or is released from custody".

208 Section 133AB "applies if" the offence is an infringement notice offence[223]. Where it applies, the member "*may* take the person into custody and ... hold the person for a period up to 4 hours"[224]. Section 133AB(3) provides that, "on the expiry of [that] period", the person "*may*" be dealt with in accordance with one of the four options provided in pars (a)-(d)[225].

209 In that context, *may* in s 133AB(2)(a) is permissive, in the sense of conferring a power to hold the person in custody, as opposed to imposing an obligation to do so. In contrast, *may* in s 133AB(3) has the purpose of imposing an obligation on police officers to adopt one of the four options identified in s 133AB(3)(a)-(d) and so should be read as *must*[226].

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223 *Police Administration Act*, s 133AB(1)(b).

224 *Police Administration Act*, s 133AB(2)(a) (emphasis added).

225 See above at [201].

226 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223 per Earl Cairns LC; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135 per Windeyer J; [1971] HCA 12; cf *Ward v Williams* (1955) 92 CLR 496; [1955] HCA 4.

210 Consequently, the effect of s 133AB(2)-(3) is that, if a person is arrested under s 123 and taken into custody on suspicion of committing, having committed, or being about to commit an infringement notice offence, s 133AB "applies"; the person is in "lawful custody under this ... Act" within the meaning of s 137(1); and s 133AB(3) requires that, upon the expiry of the period of up to four hours, the person be released unconditionally or with an infringement notice, granted bail, or brought before a justice or court under s 137.

211 The question is whether the duty under s 137(1) (to bring the person before a justice or court "as soon as is practicable after being taken into custody, unless he or she is sooner granted bail ... or is released from custody") is suspended or deferred by the exercise of the power to hold the person under s 133AB(2); or, conversely, whether the power to hold the person under s 133AB(2) is subject to the duty in s 137(1) to bring the person before a justice or court as soon as is practicable after being taken into custody unless he or she is sooner granted bail or released.

Constructional choices

212 There are two constructional choices. The first is to read the stipulation in s 133AB(2)(a) of "a period up to 4 hours" as in effect suspending or overriding, until the expiry of the period of up to four hours, the duty under s 137(1).

213 So to construe the provision would mean that, despite s 137, a person arrested under s 123 for an infringement notice offence could be held for up to four hours irrespective of whether it were practicable to bring the person before a justice or court (or release the person) within that period before being dealt with in accordance with s 133AB(3).

214 The second possible construction is to read the power to "hold the person" in s 133AB(2) as a power which arises simultaneously with the duty imposed under s 137(1). The emphasis is on the period of "up to 4 hours" as imposing a time limit of up to four hours on the exercise of the duty under s 137(1). On that construction, Div 4AA operates as a specific elaboration of the general powers and duties under s 137 for application to arrest for infringement notice offences with an outer limit on custody of up to four hours.

Preferable construction

215 There are a number of reasons to prefer the second construction. First, on the second construction, the four options provided for in s 133AB(3) for dealing with a person arrested in respect of an infringement notice offence are capable of operating harmoniously, and simultaneously, with s 137(1).

216 As was earlier noted, s 137(1) provides that a person shall be taken before a justice or court "unless he or she is sooner granted bail under the *Bail Act* or is

released from custody". On the second construction, s 133AB(3)(d) operates as a direct reference to taking the person before a justice or court under s 137. The reference to bail in s 133AB(3)(c) is a reference to a grant of bail under the *Bail Act*. Paragraphs (a)-(b) of s 133AB(3) elaborate on "release from custody" by specifying that the release can be either unconditional or upon issue of an infringement notice. The words "on the expiry of the period mentioned in subsection (2)", namely "up to 4 hours", referred to in s 133AB(3) serve to emphasise that the four options provided for in s 133AB(3)(a)-(d) are enlivened at one of three possible points in time: the passing of four hours; any earlier moment as required to discharge the duty in pars (a)-(d); or, where the person is intoxicated, the time when the police officer believes on reasonable grounds that the person is no longer intoxicated[227].

217 Secondly, as a matter of syntax, the terms of the stipulation of a period of "up to" four hours in s 133AB(2)(a) are redolent of an outer limit of four hours. There would be little point in the Legislative Assembly providing that a person may be detained for "up to 4 hours", as opposed to for "four hours", unless the purpose of so providing were to ensure that action be taken within that period as opposed to waiting until the end of it.

218 Thirdly, as already noted, s 133AB(3)(d) expressly provides that, if a person arrested under s 123 for an infringement notice offence is brought before a justice or court, the person is to be so brought "under section 137"; and s 137(1) requires that the person be so brought "as soon as is practicable" unless sooner granted bail or released. If the purpose of the stipulation of a period of "up to 4 hours" in s 133AB(2)(a) were to override the requirement in s 137 that the person be brought before a justice or court "as soon as is practicable", there would be no point in s 133AB(3)(d) expressly providing for the person to be brought before a justice or court "under section 137". Unless those words import the requirement in s 137(1) to act as soon as practicable, they add nothing to the remaining words of s 133AB(3)(d).

219 Fourthly, an infringement notice offence is by definition such a relatively minor offence that it is considered capable of expiation by means of the infringement notice procedure provided for under the *Fines and Penalties (Recovery) Act*[228]. More precisely, it is the kind of offence which the Legislative Assembly has determined does not necessitate a custodial disposition. It is, therefore, logical to expect that, where a person is arrested for such an offence, he or she will not ordinarily be detained for any more than a relatively short

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227 *Police Administration Act*, s 133AB(2)(b).

228 See above at [203].

period of time. It makes sense, therefore, that the purpose of the stipulation of a period of up to four hours is to ensure that a person who is arrested for an infringement notice offence is released, granted bail or brought before a justice or court as soon as practicable, but in any event within four hours.

220 Of course, if, while the person is in custody, the police form the belief on reasonable grounds that the person had been involved in a more serious offence of the kind provided for in s 137(3), the person may then be detained for a longer period in accordance with s 137(2). But that does not detract from the imperative that, otherwise, a person arrested under s 123 for an infringement notice offence must be released, bailed or brought before a justice or court as soon as practicable.

221 Fifthly, if the purpose of the stipulation of a period of up to four hours were to override the duty in s 137(1), it would have the irrational and capricious consequence[229] that a person arrested under s 123 on suspicion of committing, having committed or being about to commit a very serious offence – say, for example, homicide or rape – must be brought before a justice or court under s 137(1) as soon as practicable unless sooner granted bail or released, but a person arrested under s 123 for a relatively trivial infringement notice offence – say, for example, neglecting to keep the person's yard clean[230] – could be detained for longer than the time when it becomes practicable to grant the person bail, release the person unconditionally or with an infringement notice, or bring the person before a justice or court.

222 An intention to produce such an irrational and capricious dichotomy is not lightly to be attributed to a legislature, especially where it concerns the liberty of the subject[231]; and still less so where, according to the plain and ordinary meaning of the stipulation of the period of up to four hours, it is capable of operating as an outer limit in the manner already described[232]. As Wilson and Dawson JJ said in *Williams v The Queen*, questions of statutory construction regarding the powers of police to keep a person in custody[233]:

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229 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ; [1981] HCA 26.

230 *Summary Offences Act* (NT), s 78; Summary Offences Regulations, reg 3.

231 See *Donaldson v Broomby* (1982) 40 ALR 525 at 525-526 per Deane J.

232 See *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 585 [48] per Gummow and Hayne JJ; [2006] HCA 50.

233 (1986) 161 CLR 278 at 304; [1986] HCA 88.

> "must necessarily be considered against the background of the common law which provides in this instance the spirit if not the letter of the law. The presumption which requires clear words to override fundamental common law principles has an obvious application in a matter as basic as the liberty of the person".

223 Here, s 137(1) reflects the basic common law tenet that a person must be taken before a court as soon as reasonably practicable following arrest. A statute that departs from that fundamental position would need to be expressed in unmistakably clear terms.

224 Sixthly, s 16(2) of the *Bail Act* provides that, within the time for bringing a person before a justice or court under s 137(1), and so, in effect, as soon as practicable after arrest, the police may inform the arrested person of his or her right to apply for bail; and s 16(3) provides that, as soon as practicable after a person becomes entitled to apply for bail, and therefore, in effect, as soon as practicable after arrest, a police officer must determine whether bail should be granted. If the stipulation of a period of up to four hours in s 133AB(2)(a) meant that police could detain a person arrested under s 123 for an infringement notice offence beyond the point at which it became practicable to make a determination to either grant or refuse bail, it would be in direct conflict with s 16(2) of the *Bail Act*.

225 It is not to be assumed that s 133AB(2)(a) was intended to contradict s 16(2) of the *Bail Act* or to amend it. Evidently, it was not considered that the two provisions would conflict. There is no suggestion of such a conflict in the *Police Administration Amendment Act* or in any of the extrinsic materials. To the contrary, in the course of the debates in the Legislative Assembly which preceded the enactment of s 133AB(2)(a)[234], reference was made to the right of a person under s 33(3)(b) of the *Bail Act* to apply to a magistrate or justice after the expiration of four hours following charge for review of a police officer's failure or refusal to grant bail as soon as practicable. There was no suggestion of curtailing or restricting that right. The debate rather suggests that the period of up to four hours in s 133AB(2)(a) was chosen because it aligned with the period specified by s 33(3)(b) of the *Bail Act*.

226 Seventhly, if s 133AB(2)(a) were taken as overriding s 16(2) of the *Bail Act* in its application to a person arrested under s 123 for an infringement notice offence, it would have the added irrational and capricious consequence that a person arrested for a serious offence – again say, for example, homicide or

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234 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014.

rape – would have the right to make an application for bail and have it considered as soon as practicable after arrest, whereas a person arrested under s 123 for a relatively trivial infringement notice offence would have no right to apply for bail or to have his or her application considered until the expiration of four hours following arrest.

227 As Fullagar J stated in *Butler v Attorney-General (Vict)*[235], every attempt should be made to reconcile competing statutes and it is only where they are irreconcilable that they should be held to conflict. Here, s 133AB(2)(a) of the *Police Administration Act* and s 16(2) of the *Bail Act* can be reconciled in the manner already explained by reading the stipulation of a period of up to four hours in s 133AB(2)(a) as imposing an outer limit on the time for which a person arrested under s 123 for an infringement notice offence may be detained, and thus as being without prejudice to the requirement specified in s 137(1) that the person must be released, granted bail or taken before a justice or court as soon as practicable.

228 The plaintiffs contended that so to construe Div 4AA would render the Division inutile. But plainly that is not so. On the second construction, Div 4AA serves the important function of clarifying that an infringement notice may be issued where a person is released following arrest, and it caps the period of detention in relation to an infringement notice offence at four hours.

229 That statutory purpose of Div 4AA is found in its text[236]. It is not to be displaced by what was said by the Attorney-General for the Northern Territory when the Bill for its enactment was introduced into the Legislative Assembly of the Northern Territory[237], or in the subsequent debates in the Legislative Assembly[238]. The words of the Minister cannot be substituted for the text of the

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235 (1961) 106 CLR 268 at 276; [1961] HCA 32. See also *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 145-146 [47]-[49] per Gummow and Hayne JJ; [2006] HCA 5.

236 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; [1987] HCA 12; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 263-271 [26]-[59]; [2010] HCA 23; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 527 [50]; [2011] HCA 33; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 659 [32]; [2013] HCA 52.

237 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 2014.

238 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 November 2014.

Act[239]. As Hayne J observed in *Momcilovic v The Queen*, the relevant "intention" of the legislature is revealed by construction of the law in question[240]:

> "Use of the metaphor of 'intention' or 'will' must not be understood as inviting attention to the wishes or hopes of those who promoted the legislation in question. What matters is the reach and operation of the law in question as that reach and operation are ascertained by the conventional processes of statutory construction. The metaphor of intention must not obscure the centrality of construing the laws in question."

Primacy must be given to the statutory language over what has been said in the extrinsic materials[241].

Correct construction of s 133AB(2)(a)

230 For those reasons, it should be concluded that, upon the proper construction of Div 4AA, s 133AB(2)(a) sets an outer limit of four hours on the time for which a person arrested under s 123 for an infringement notice offence may be held before being released unconditionally or with an infringement notice, granted bail, or taken before a justice or court; and that the outer limit of four hours set by s 133AB(2)(a) is without prejudice to the requirement, which applies under s 137(1) to a person arrested under s 123 for an infringement notice offence, that the person be taken before a justice or court as soon as practicable after arrest unless sooner released (either unconditionally, with an infringement notice, or on bail) under s 133AB(3).

231 It follows that, when a person is arrested under s 123 for an infringement notice offence, then, as soon as practicable after the person is taken into custody, he or she must be either released unconditionally or with an infringement notice, granted bail, or taken before a justice or court under s 137(1). That means that any detention of the person for longer than required to render it practicable so to release the person or take the person before a justice or court would be unlawful (even if it were within the four hour period specified in s 133AB(2)(a)) and so would be actionable at the suit of the person for damages for false imprisonment[242].

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239 *Re Bolton* (1987) 162 CLR 514 at 518.

240 (2011) 245 CLR 1 at 133-134 [315]; see also at 74 [111]; [2011] HCA 34.

241 *Saeed* (2010) 241 CLR 252 at 263-271 [26]-[59].

242 *Watson v Marshall* (1971) 124 CLR 621 at 626 per Walsh J; [1971] HCA 33.

232 It also follows that, where a person is arrested under s 123 for an infringement notice offence and it is not practicable at any point before the expiration of the four hour period referred to in s 133AB(2)(a) to release the person unconditionally or with an infringement notice, grant the person bail, or take the person before a justice or court under s 137(1), the person must nevertheless be dealt with in one of those four ways upon the expiration of the four hour period. In those circumstances, any detention for longer than that without releasing the person or taking the person before a justice or court under s 137(1) would be unlawful and actionable at the suit of the person for damages for false imprisonment.

233 The foregoing requirements are, however, subject to s 133AB(2)(b), such that, if the person is intoxicated, the person may be held for a period longer than four hours until the person is believed on reasonable grounds no longer to be intoxicated. They are also subject to s 137(2), and so a police officer may continue to hold a person arrested under s 123 for an infringement notice offence for questioning or investigation in relation to another offence in accordance with s 137(3) for the period specified in s 137(2).

The plaintiffs' constitutional arguments

234 The plaintiffs advanced two constitutional arguments in the alternative. The first was that Div 4AA impermissibly confers judicial power on the executive government of the Northern Territory by permitting a "superadded" period of detention for up to four hours in addition to any time required to bring a person before a justice or court under s 137(1). The second was that Div 4AA undermines the institutional integrity of the Supreme Court of the Northern Territory, in contravention of the *Kable* doctrine.

235 The first argument assumes that Div 4AA should be characterised as conferring a power on the executive which is "penal or punitive".

236 In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ said that, subject to certain exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[243]. The "most important" exception to that principle, however, is "the arrest and detention in custody ... of a person accused of crime to ensure that he or she is available to be dealt with by the courts"[244].

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243 (1992) 176 CLR 1 at 27; [1992] HCA 64.

244 (1992) 176 CLR 1 at 28.

237 For the reasons already given, Div 4AA should not be construed as permitting the detention of a person for a period longer than is reasonably necessary to bring the person before a justice or court. Upon its proper construction, Div 4AA falls squarely within the arrest and detention in custody exception to the principle adumbrated by Brennan, Deane and Dawson JJ in *Chu Kheng Lim*. That is so even though the *Fines and Penalties (Recovery) Act* contemplates that a person issued with an infringement notice will not be dealt with by a court in relation to that infringement notice offence if the offence is expiated. That statutory regime provides for a diversion from, rather than a substitute for, the bringing of an alleged offender before a court in relation to the offence. It is, therefore, unnecessary to consider whether the separation of powers doctrine limits the Commonwealth's legislative power under s 122 in the manner submitted by the plaintiffs.

238 The plaintiffs' second constitutional argument was put on the basis that Div 4AA grants the police a power to detain a person in circumstances where, as a matter of practicality, the exercise of the power is immune from supervision by a court, contrary to the principles in *Kable*[245] and *Kirk*[246].

239 That argument may also be disposed of briefly. On its proper construction, Div 4AA does not grant police a power to detain for a period longer than provided for by ss 123 and 137. For that reason, Div 4AA cannot be regarded as usurping or otherwise interfering with the exercise of judicial power by a court of the Territory once a person who has been arrested is brought before the court.

Abuse of power

240 Finally, it should be mentioned that, during the course of argument, counsel for the plaintiffs expressed concerns that Div 4AA appeared to contemplate the arrest and taking into custody of a person for an infringement notice offence for which the maximum penalty is non-custodial and therefore for which arrest and taking into custody may not be necessary.

241 Those concerns are unwarranted. The powers of police to arrest a person and take him or her into custody are only to be exercised for the purposes for which the powers are granted and, therefore, only for a legitimate reason. Where, therefore, a police officer reasonably suspects that a person has committed, is committing or is about to commit an infringement notice offence of such a minor nature that it does not carry or is unlikely to be visited with a

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245 (1996) 189 CLR 51.

246 (2010) 239 CLR 531.

penalty of imprisonment, then, unless the offence is continuing or there is an ongoing risk to public safety or order, it is difficult to conceive of a legitimate reason for the police officer to arrest the person rather than issue an infringement notice "on the spot". The exercise of police powers is also subject to well-established mechanisms of legal supervision. Actions in assault, trespass and false imprisonment lie in respect of unlawful arrest, and exemplary damages may be awarded[247]. And, in the Northern Territory, a deliberate delay in bringing a person who has been arrested before a court is a crime punishable by imprisonment[248].

Conclusion

242 Division 4AA is not invalid on either basis advanced by the plaintiffs. The questions in the special case should be answered as follows:

(1)(a) No.

(1)(b) No.

(2) The plaintiffs.

(3) The proceeding should be remitted to a single Justice of this Court for further directions.

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247 *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57.

248 *Criminal Code* (NT), s 106.