IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M45 of 2015

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED (ACN 118 017 842)
First Plaintiff

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and

MIRANDA MARIA BOWDEN
Second Plaintiff

and

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NORTHERN TERRITORY OF AUSTRALIA
Defendant

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ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

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

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the statement of the applicable constitutional and legislative provisions set out in Annexure A to the plaintiffs' submissions.

Part V: Submissions

5. In summary, South Australia submits:

   i. Territory courts are "other courts" within the meaning of s 71 of the Constitution and are subject to Ch III of the Constitution;

   ii. the separation of powers at the Commonwealth level does not apply to the Territories;

   iii. as suitable repositories for the conferral of federal jurisdiction, the courts of the Northern Territory are subject to the *Kable* principle[1];

   iv. Div 4AA of Part VII of the *Police Administration Act* (NT) (**the PA Act**) does not undermine the institutional integrity of the courts of the Northern Territory and thus the *Kable* principle has no application to this case; and

   v. in the alternative, even if the principle derived from *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[2] (***Lim***) applies to the Northern Territory (which is denied), the statutory powers provided for under Div 4AA:

      (a) fall within the well-recognised exception identified in *Lim*,[3] namely, that 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

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[1] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 103 (Gaudron J); *Fardon v Attorney General* (Qld) (2004) 223 CLR 575; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (WA) (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; and *Pollentine v Bleijie* (2014) 88 ALJR 796.

[2] (1992) 176 CLR 1.

[3] (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

courts is not "punitive" and is not an exclusive function of judicial power; and

(b) can be characterised as protective in character.

The Legislation

6. Division 4AA of the PA Act provides for the arrest of persons without warrant[4] for an offence identified as an "infringement notice offence". Section 133AA defines "infringement notice offence" as "means an offence under another Act for which an infringement notice may be served and which is prescribed for this Division by regulation." The offences prescribed for the purposes of s133AA are set out in the special case book: **SCB** 164-166.

7. Section 133AB provides that where a member of the Police Force has arrested a person without warrant for an infringement notice offence, the member may hold the person for 4 hours (s133AB(2)(a)) or if the person is intoxicated, hold the person for longer than 4 hours and until such time as the member believes the person is no longer intoxicated (s133AB(2)(b)).

8. On the expiry of the period provided for by s133AB(2), s133AB(3) confers a discretion on the member of the Police Force (or any other member of the Police Force) to do one of four things:

   (a) release the person unconditionally;

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

   (c) release the person on bail; or

   (d) exercise the power under s137 to bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

9. Section 133AC(1) identifies the procedures that must be observed once a person is taken into custody under s133AB. Relevantly, the member of the Police Force must establish the person's identity, which requires:

   (i) taking and recording the person's name;

   (ii) taking and recording further information relevant to the person's identity, such as:

      (A) photographs

      (B) fingerprints; and

[4] Arrest without warrant is provided for by s 123 of the PA Act.

(C) other biometric identifiers.

10. In addition to the procedures that must be observed under s133AC(1), s133AC(2) also confers a broad discretion on a member of the Police Force to exercise various powers such as:

(i) search the person or cause for the person to be searched by an appropriate person; and

(ii) remove from the person any money, valuables or items likely to cause harm.[5]

It would no doubt follow that a member of the Police Force would also possess a discretion to ensure appropriate medical attention was obtained and administered if necessary.

11. Section 137(1) of the PA Act relevantly 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.

12. Section 137(1) applies to a person whose arrest falls within the application of s133AB of the PA Act. That is to say, a person arrested without warrant pursuant to s123 must be brought before a court unless released under the *Bail Act* (NT) or "released from custody". Section 137(1) thus contemplates the "unconditional release" provided for by s133AB(3)(a). A person who is not released under s133AB(3)(a), released under 133AB(3)(b), or bailed (s133AB(3)(c)) must be dealt with under s137: s133AB(3)(d). Further, the fact that s136 does not disapply the application of Div 6 (which includes s137) to persons falling within the terms of Div 4AA reinforces the conclusion that s137 applies to Div 4AA.

13. For completeness, ss137(2) and 137(3) are not exceptions to the requirement imposed under s137(1), rather, they identify the time period within which a person may be held prior to being brought before a court, such period being "a reasonable period".

14. The plaintiffs rely on the provisions of Div 4AA, especially ss133AB(2)(a) and 133AB(3)(a), to ground its allegation that Div 4AA impermissibly undermines or impairs the institutional integrity of the Supreme Court of the Northern Territory (i.e. the *Kable* principle) or is otherwise in breach of Ch III of the Constitution by vesting judicial power in the executive (the "separation of powers" principle).

15. For the reasons that follow, the enactment of self-government legislation under s122 of the Constitution does not produce the consequence that the separation of powers at the

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[5] Section 133AC(3) of the PA Act further provides that where a member of a Police Force has removed items from the person taken into custody, the member must record those items in a register.

Commonwealth level applies to the Territories. Accordingly, the only relevant ground of potential invalidity in this case is to be derived from the *Kable* principle.

16. In the alternative, for the reasons identified below at [39]-[43], even if the principle in *Lim* has potential application to the present case, properly construed, the statutory scheme falls within the exception to the principle identified in *Lim* and cannot be characterised as being "punitive" in character or as vesting an exclusive judicial function in the executive. Indeed, Div 4AA can be characterised as protective in character.

Ch III, Territory courts & the *Kable* doctrine

10 17. Despite the alleged lack of coherence with respect to the relationship between Territory courts and Ch III of the Constitution in the cases, a number of basic propositions command assent.

18. First, Territory courts are not established or created under Ch III, but are recognised by it in s 71: *Re Governor, Goulbourn Correctional Centre; ex parte Eastman*[6] (***Eastman***); *North Australia Aboriginal Legal Aid Service Inc v Bradley*[7] (***Bradley***). They are "such other courts…" as identified in s 71.

19. Second, the source of legislative authority for the creation of Territory courts, like all Territory laws, is s 122 of the Constitution: *Eastman*[8]; *Spratt v Hermes*[9] (***Spratt***); *Capital TV and Appliances Pty Ltd v Falconer*[10] (***Falconer***). This is also consistent with the approach in *Northern Territory v GPAO*[11] (***GPAO***) where it was held that when a federal court is determining a matter that
20 arises under a law made pursuant to s 122, it is exercising federal jurisdiction.

20. Third, the source of the power to vest territory courts with federal jurisdiction is s 71 of the Constitution: *Gould v Brown*[12]; *GPAO*[13]; *Kruger v Commwealth*[14].

21. Fourth, the fact that the separation of powers is constitutionally entrenched at the Commonwealth level does not in itself impose upon s 122 a constitutional limitation on the Commonwealth's legislative power with respect to Territories so as to entrench the separation of powers at the Territory level. The exercise of judicial power in territory jurisdiction is similar (though clearly not identical) to the exercise of State jurisdiction in State courts. The

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[6] (1999) 200 CLR 322.
[7] (2004) 218 CLR 146 at 163 [31] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[8] (1999) 200 CLR 322 at [7] (Gleeson CJ, McHugh and Callinan JJ), [40] (Gaudron J), [57] and [63] (Gummow and Hayne JJ), [118]-[122] (Kirby J).
[9] (1965) 114 CLR 226.
[10] (1971) 125 CLR 591.
[11] (1999) 196 CLR 553.
[12] (1998) 193 CLR 346 at [64]-[65] (Gaudron J).
[13] (1999) 196 CLR 553 at 604-605 (Gaudron J).
[14] (1997) 190 CLR 1 (Gummow J).

plaintiffs' invocation of the principle that the stream cannot rise higher than its source is misconceived in this case. That principle cannot apply with respect to the enactment of self-government legislation in the territories. To invoke such a principle in this constitutional context would, in effect, mean that the legislative powers of self-governing territories would be limited to the heads of power available to the Commonwealth. That proposition is contrary to the principle, recognised in this Court, that legislative power conferred on self-governing territories is plenary: *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*.[15] Thus, the exercise of non-federal jurisdiction is a matter for State and Territory legislatures and not subject to constitutional constraints imposed by the Commonwealth Constitution save for two exceptions, only one of which applies to the Territories. The first exception is that any Court capable of being vested with, and exercising, federal jurisdiction must be a suitable repository for the exercise of the judicial power of the Commonwealth (the *Kable* limitation).[16] The second exception, which applies to the States but not to the Territories, is derived from a combination of textual and historical sources which are sui generis to the States: namely, that there must be State Supreme courts capable of exercising "supervisory jurisdiction" (the *Kirk* limitation).[17]

22. With respect to the *Kable* limitation, the conceptual basis for the "constitutionally mandated position"[18] of State courts in the Australian legal system arises from their role as receptacles of federal jurisdiction. As Territory courts are vested with federal jurisdiction, they too must be suitable receptacles of such jurisdiction. Accordingly, there is a shared conceptual basis justifying the extension of *Kable* to territory courts.[19]

23. With respect to the *Kirk* limitation, the textual and historical justification for *Kirk* does not apply to Territory courts. There is no textual reference to "Supreme Court of a Territory" and at federation there were no self-governing territories with established Territory courts. That is not to deny that there may be good reason to justify an extension of *Kirk* principles to Territory courts[20], but that is not necessary for the resolution of the present case. Indeed, such

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[15] (1992) 177 CLR 248 at 272-273, 280-282 (Brennan, Deane and Toohey JJ), 284 (Gaudron J).
[16] *Bradley* at [28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *GPAO* at [127] (Gaudron J); *Eastman* at [25]-[36] (Gaudron J), [63] (Gummow and Hayne JJ).
[17] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
[18] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [101] (Gummow J).
[19] *Wainohu v New South Wales* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ). It is well settled that *Kable* applies to the Territories as Ch III courts: *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 534 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[20] One could justify an extension of *Kirk* to the Territories on normative-functional grounds. A normative-functional justification has one textual hook, "government" in s 122. The constitutional power to make laws enabling Territories to be self-governing may attract a functional capacity in superior courts of territories to exercise supervisory jurisdiction to correct for jurisdictional error. This would preclude the establishment of "islands of power" immune from review.

a question ought not be dealt with unless necessary.[21]

24. Accordingly, the only limitation relevant to the present case must be a *Kable* limitation. There cannot be a general "separation of powers" limitation of a kind attached to the Commonwealth that is superimposed on Territories. There is no textual, historical or functional reason to imply any such limitation with respect to the Territories and it is certainly not a necessary implication to be drawn from the text and structure of the Constitution.

25. Thus, as was stated in *Assistant Commissioner Condon v Pompano*[22] ***(Pompano)***, and reiterated in the joint judgment in *Pollentine v Bliejie*[23] ***(Pollentine)***:

> ...the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth.

26. Put shortly, as Gummow J observed in *Fardon*[24], which was endorsed in *Pompano*[25], the repugnancy doctrine "does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III".

The *Kable* principle

27. The principle in *Kable* applies to ensure the institutional integrity of courts capable of exercising federal jurisdiction. The concept of institutional integrity directs attention to the focus of the *Kable* principle: it is concerned with incursions on the defining characteristics of courts.[26] The relevant question in this field of enquiry is directed to whether a law in some way distorts the processes or functions inherent to the exercise of judicial power by courts. As Gummow, Hayne and Crennan JJ put it in *Forge v Australian Securities and Investments Commission*:[27]

> the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme 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

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[21] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 355 (Crennan J); *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ, McTiernan, Webb, Fullagar, Kitto and Taylor JJ). See also *Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469 at 491-492 (Griffith CJ), at 553-554 (Isaacs J); *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58] (Gleeson CJ, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [250]-[252] (Gummow and Hayne JJ); *O'Donoghue v Ireland* (2008) 234 CLR 599 at 614 [14] (Gleeson CJ).

[22] (2013) 252 CLR 38 at 89 [125] (Hayne, Crennan, Kiefel and Bell JJ).

[23] (2014) 88 ALJR 796 at 804 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[24] (2004) 223 CLR 575 at 618 [104] (Gummow J).

[25] (2013) 252 CLR 38 at 89 [124] (Hayne, Crennan, Kiefel and Bell JJ).

[26] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]-[64] (Gummow, Hayne and Crennan JJ).

[27] (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ)).

those defining characteristics which mark a court apart from other decision-making bodies.

28. So understood, *Kable* is only engaged where a law of State or Territory substantially impairs the institutional integrity of a court and thus impairs its ability to exercise federal jurisdiction. Consequently, before *Kable* has any work to do, the impugned law must have some relevant effect on the institutional integrity of a court. There lies the defect in the plaintiffs' case.

29. Div 4AA of the PA Act has no effect on the institutional integrity of any court. Div 4AA neither directs courts as to the manner or exercise of judicial power, nor alters the defining characteristics of courts in any way. Stark contrasts are to be drawn from other *Kable*-type cases such as *South Australia v Totani*[28], *Wainohu v New South Wales*[29], *International Finance Trust Company Ltd v New South Wales Crime Commission*[30], *Pompano*[31] and *Pollentine*.[32] The legislation in those cases, unlike the legislation in this case, was generally impugned on the basis the courts were compelled to exercise functions antithetical to orthodox judicial processes and thus undermined the institutional integrity of the courts as courts suitable for the exercise of federal jurisdiction. The alleged "impairment" arose because the relevant legislation required courts to make orders on the basis of binding declarations of other persons[33], or directed courts to hear applications ex-parte[34], or in some other way altered the process by which courts exercised their orthodox judicial function[35]. Div 4AA, however, has no such effect. Div 4AA is not directed to the exercise of judicial power at all; it has no impact on courts or the manner and exercise of judicial process. That being so, Div 4AA has no effect on the institutional integrity of courts. Accordingly, *Kable* has no application in this case.

Exercise of power under Div 4AA

30. The plaintiffs identify two features of the PA Act said to impair the institutional integrity of the Court. The first concerns access to judicial review, the second concerns the criteria applicable to any such review.

31. With respect to access to courts, there is no prohibition precluding judicial oversight of the powers conferred on members of the Police Force under Div 4AA. There is no statutory preclusion on seeking judicial review during the period a person is in custody. Judicial review

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[28] (2010) 242 CLR 1 (***Totani***).
[29] (2011) 243 CLR 181 (***Wainohu***).
[30] (2009) 240 CLR 319 (***IFTC***).
[31] (2013) 252 CLR 38.
[32] (2014) 88 ALJR 796.
[33] see *Serious and Organised Crime (Control) Act 2008* (SA), ss 10(1), (3), (4)(a), 14(1), (5), (6), 22(1), 35(1)(b), (2); *Totani* (2010) 242 CLR 1.
[34] see *Criminal Assets Recovery Act 1990* (NSW), ss 10, 22, 25; *IFTC* (2009) 240 CLR 319.
[35] see *Criminal Law Amendment Act 1945* (Qld), s 13; *Pollentine* (2014) 88 ALJR 796.

remains available during the period of detention and in fact becomes mandatory under s137 if a person is not released within the time period identified in s133AB(2).

32. It may be accepted that review immediately after arrest may be practically difficult in terms of time and place, especially in remote areas, but the practical problems that may arise from such temporal or geographical considerations do not detract the validity of the law which provides for arrest and detention in the first instance. Put simply, the practical exigencies of accessing a court does not alter the fact that judicial oversight is permitted, and once the relevant time period set down in Div 4AA and s 137 is reached, mandated.

33. Review may also be engaged if a person arrested for an "infringement notice offence" decides to contest the issuing of such a notice: *Fines and Penalties (Recovery) Act* (NT) ss21 and 22.

34. In light of the above, there is no statutory basis to ground the assertion that the supervisory jurisdiction of the Territory Supreme Court[36] cannot be engaged.

35. With respect to the criteria applicable to the exercise of judicial review concerning Div 4AA, the plaintiffs' submission is misconceived. The judicial review of statutory power, including statutory discretions, are always exercises in statutory construction. In this sense, all exercises in judicial review are determined by assessing the decision-maker's decision against the statutory framework empowering the decision. While the nature of legislative criteria may have consequences for questions of amenability or the nature and scope of the review, the bare assertion that review limited to reviewing the satisfaction of legislative criteria underlying an exercise of statutory power leads inexorably to a substantial impairment of the institutional integrity of a court is misplaced. While there is no doubt that a legislative direction to a court limiting review, or the cloaking of an administrative decision with judicial authority *may* give rise to questions concerning institutional integrity of courts, neither of those factors are present in this legislative regime. The factors that may be taken into account on a review of Div 4AA are to be discerned from the text and would extend to all the matters that arise from the initial arrest under s123 through to the exercise of the powers under Div 4AA. The fact that the plaintiffs identify a difference between a review under the *Bail Act* (NT) and review of a power exercised under Div 4AA says nothing about the institutional integrity of the court required to undertake the review; the differences in the nature of the review reflect the different statutory regimes.

36. Further, the fact that an action for false imprisonment must occur after the detention has

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[36] The reference to "supervisory jurisdiction" in this context says nothing about whether such jurisdiction in Territory courts is constitutionally entrenched or mandated. That is not a question raised in the special case and thus does not arise.

ceased is hardly a novel occurrence, indeed, that is generally inherent to the tort.[37] Further, the tort is not a *substitute* for other forms of judicial scrutiny; it is additional to it. Other forms of judicial scrutiny may also be engaged where, for example, there was a collateral challenge in a prosecution arising out of the exercise of the power of arrest under 123 and Div 4AA[38], which may lead to the exclusion of evidence. In any event, the existence or otherwise of common law or statutory causes of action arising out of an exercise of a statutory power says nothing about the validity of the relevant statutory provision itself; it speaks only to whether the conduct alleged falls within the terms authorised by the statute.

37. Finally, the plaintiffs' attack on the validity of Div 4AA is difficult to reconcile with the decision in *Pollentine*.[39] Accepting the very different nature of the statutory scheme in issue in *Pollentine*, the Court nevertheless held that "giving the Executive the power to make decisions about absolute or conditional release of persons detained under s18 is not shown to be incompatible with or repugnant to the institutional integrity of the State courts"[40]. The basis of that holding was that the plaintiffs in *Pollentine* were unable to point to specific features of the *Criminal Law Amendment Act 1945* (Qld) that were incompatible with, or repugnant to, the institutional integrity of State courts. The same conclusion is compelling in this case. None of the provisions of Div 4AA (or the PA Act more broadly) undermine the institutional integrity of the courts of the Northern Territory. That being so, the exercise by the executive of a discretion conferred by statute cannot of itself give rise to an interference with the institutional integrity of the courts of the Northern Territory. In the absence of the plaintiffs being able to demonstrate the manner in which the impugned provisions undermine the institutional integrity of the courts, the plaintiffs' case must fail.

38. For the reasons identified above, the provisions of the PA Act, properly construed, do not in any way undermine the institutional integrity of the courts of the Northern Territory. Consequently, *Kable* has no application to the present case.

The principle in *Lim*

39. The plaintiffs rely[41] on the principle, identified in *Lim*[42] and subsequent cases[43], that, subject to

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[37] See *Macpherson v Brown* (1975) 12 SASR 184.
[38] Prosecutions may follow from the investigations contemplated by s133AB(4) or an election made under s21 of the *Fines and Penalties (Recovery) Act* (NT).
[39] (2014) 88 ALJR 796.
[40] (2014) 88 ALJR 796 at [51] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[41] Plaintiffs' submissions [31]-[40].
[42] (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ),

limited exceptions, involuntary detention by the executive 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."[44] The plaintiffs' reliance on *Lim* cannot be sustained. That is so for two reasons.

40. First, that principle was derived from, and is inherently connected with, a constitutional separation of powers. In the Australian constitutional context, that principle applies only to the Commonwealth. It does not apply to the States, and for the reasons identified above[45], it does not apply to the self-governing Territories. Thus, the principle has no free-standing or independent application to the constitutional arrangements of the States or Territories. The only manner in which such a principle can apply to the States or Territories is via *Kable*. That is to say, it could only arise in cases where the courts of a State or Territory were assigned a function or power that was non-judicial in character and which substantially impaired or interfered with the institutional integrity of courts as suitable repositories of federal jurisdiction. For the reasons identified above, that circumstance does not arise in this case.

41. Secondly, even if *Lim* can have application to the present case, the statutory scheme of the PA Act clearly falls within the recognised exception to the principle identified by the majority in *Lim*. As Brennan, Deane and Dawson JJ noted[46]:

> There are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch. III courts. The most important is that which Blackstone himself identified in the above passage, namely, 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. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the "ancient common law" jurisdiction, "before and since the conquest", to order that a person committed to prison while awaiting trial be admitted to bail. Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt and of military tribunals to punish for breach of military discipline, the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.

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[43] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; *Al-Kateb v Godwin (2004) 219 CLR 562*; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [138]-[139] (Crennan, Bell and Gageler JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 272.

[44] (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[45] See [17]-[26].

[46] (1992) 176 CLR 1 at 28 (footnotes omitted).

42. The statutory scheme in this case operates upon the formation of a reasonable belief by a member of the Police Force that a person has committed, is committing or is about to commit an offence: PA Act s123. Once arrested, the person must be dealt with in accordance with the PA Act and, relevantly, where the offence is "an infringement notice offence", the person must be dealt with in accordance with s133AB. Where Div 4AA applies, the person arrested must be brought before a court unless released or bailed: PA Act ss137(1); 133AB(3). So understood, the provisions of Div 4AA fall within the broad exception recognised in *Lim*; the statutory scheme does no more than provide in express terms what would otherwise be implied; namely, a time period within which "to ensure that [the person] is available to be dealt with by the courts"[47]. Consequently, even if the principle in *Lim* applies, the statutory scheme falls within the exception identified by the majority in that case.

43. Further still, there is no reason in principle why Div 4AA ought not be characterised as serving protective or non-punitive ends. The plaintiffs seek to reason backwards from one or perhaps two of the powers provided for by s133AB(3) - unconditional release under s133AB(s)(a) or release with an infringement notice under s133AB(3)(b) - to ground the assertion that the purpose of Div 4AA is penal or punitive in character. Such reasoning is flawed for three reasons. First, it is apparent that a purpose (amongst other purposes) of Div 4AA is preventative or protective[48] in character. Assuming the power of arrest in s123 is properly engaged (i.e. the member of the Police Force has reasonable grounds to believe that a person has committed, is committing or is about to commit and offence), taking the person into custody preserves public order and the welfare of the community, and in circumstances of intoxication, the welfare of the offender is also protected. Releasing a person under s133AB(3)(a) or (b) does not indicate that the purpose of that Division is punitive and not protective. The protective purposes of Div 4AA may, in many cases, have been fulfilled by having the person in custody prior to the time of release. It is inevitable that the discretion conferred under s133AB(3) needs to be broad enough to ensure that the protective purposes of Div 4AA can be fulfilled without compelling the executive to charge an offender. It also follows that the discretion needs to be broad enough to accommodate the various outcomes of the inquiries permitted under s133AB(4), which outcomes would include that no offence has been committed, was being committed or was about to be committed, or that the individual circumstances relevant to the offender indicated that release was appropriate. The fact that unconditional release or release with an infringement notice offence is provided for under the statute does not indicate that the purpose served by the relevant provisions are not protective or preventative. Secondly, the protective purposes that may be served by Div 4AA

[47] (1992) 176 CLR 1 at [28] (Brennan, Deane and Dawson JJ).
[48] As is pleaded by the Defendant in its Defence at [28]: **SCB** 33-34.

are not denied by the existence of powers in Div 4. The fact that a statute may provide for the exercise of similar or overlapping powers does not mean that each of the powers ought to be given a limited construction or a limited characterisation. The statutory text ought to be construed in light of its evident purposes, consistently with the modern approach to statutory construction. Thirdly, it is clearly established that it is for the prosecuting authorities, not the courts, to determine who is prosecuted and for what offences: *Magaming v The Queen*[49]. Section 133AB(3) speaks to that discretion and is not invalid for doing so.

44. Finally, it is unnecessary to have resort to proportionality analysis for the purposes of determining constitutional validity in this case. That is so for three reasons. First, for the reasons identified above, the separation of powers that exists at the Commonwealth level does not flow through to the legislative power vested in self-governing territories under s122 of the Constitution. Accordingly, the only potential basis of invalidity available to the plaintiffs on the special case is the *Kable* principle. Given the provisions of Div 4AA are not directed to courts and thus do not undermine or impair their institutional integrity, there is no legislative context to engage in the constructional exercise that proportionality analysis invites. Secondly, leaving aside controversies about what precisely is captured by the concept of "proportionality" in this field of discourse[50], the orthodox and better view is that "proportionality" analysis is relevant only to cases concerning characterisation of enumerated "purpose" powers[51] or cases concerning implied limitations derived from the text and structure of the Constitution[52]. In a constitutional context where the legislative powers of a polity are not expressly enumerated but are plenary in nature, as they are in respect of self-governing territories, proportionality analysis serves no purpose. Thirdly, the constitutional context in this case is far removed from that to which the submissions of the Australian Human Rights Commission (**AHRC**) refers[53]. Reference to the jurisprudence of the European Court of Human Rights speaks to an entirely different constitutional context. This case does not involve the interpretation of express civil and political rights enshrined in national and supra-national instruments. The Constitution is not to be interpreted as subject to limitations derived from international law: *AMS v AIF*.[54] Accordingly, the submissions of the AHRC are of no direct relevance to this case.

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[49] (2013) 252 CLR 381 at 394 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[50] See e.g., Leslie Zines, *The High Court and the Constitution* (5th ed), 59-62.
[51] Such as the defence power or the external affairs power. See *Theophanous v Commonwealth* (2006) 225 CLR 101 at 128 [70] (Gummow, Kirby, Hayne, Haydon and Crennan J); *Leask v Commonwealth* (1996) 187 CLR 579 at 593-595 (Brennan CJ), 602-603 (Dawson J), 616-617 (McHugh J), 624 (Gummow J).
[52] Such as the implied freedom of political communication. See e.g., *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *Coleman v Power* (2004) 220 CLR 1, *Monis v The Queen* (2013) 249 CLR 92; *Unions NSW v New South Wales* (2013) 252 CLR 530.
[53] Proposed submissions of the Australian Human Rights Commission, [33]-[51], [71].
[54] (1999) 199 CLR 160 at 180 (Gleeson CJ, McHugh and Gummow JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 386 [101] (Gummow and Hayne JJ).

Part VI: Estimate of time for oral argument

45. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

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