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

and

MIRANDA MARIA BOWDEN

Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

PLAINTIFFS' ANNOTATED SUBMISSIONS IN REPLY

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Filed on behalf of: the Plaintiffs

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Part I: Internet Certification

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

Part II: Reply

2. The NT submits that the arrest and detention of a person under s 133AB is within one of the qualifications accepted in *Lim* on the basis that it is to ensure that the person is available to be dealt with by the courts (Defendant's Submissions (**DS**) at [23]). This submission should be rejected for the following reasons:

   (a) it is premised on an erroneous construction of the provisions;

   (b) it fails to take account of cases where there is no realistic prospect of bringing the person to court;

   (c) it ignores the purpose of the "paperless arrest" regime, which is to save police time by not having to charge people and take them to court;

   (d) it does not address the disproportionate nature of the regime.

Construction

3. The NT submits that Div 4AA should be construed as subordinate to and controlled by s 137(1) of the PA Act.[1] On this construction, the person must be taken before a justice or a court if s 137(1) requires him or her to be so brought within the four hour period, even though s 133AB(2)(a) expressly empowers a member of the Police Force to "take the person into custody and ... hold the person for a period up to 4 hours". It is said to follow from this that Div 4AA works no superadded period of detention, and that Div 4AA can clothe itself and share in the purpose which animates the existing scheme of arrest and detention in Divs 3 and 6.

4. The NT's construction should be rejected. It would require the Court to disregard the clear words and statutory purpose of Div 4AA.

5. The settled approach for resolving tensions in the provisions of a statute is "to determine which is the leading provision and which the subordinate provision, and

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1 See DS at [29], [38]. See also NSW at [18], [20], [24], [27]; Qld at [5]; SA at [12], [42].

which must give way to the other".[2] The NT and interveners give primacy to s 137(1) due to:

(a) the generality of the language which triggers its operation ("a person taken into lawful custody under this or any other Act");

(b) the generality of the proviso to s 137(1), which is said to contemplate the different options available under s 133AB ("unless he or she is sooner granted bail under the *Bail Act* or is released from custody"); and

(c) section 136, which only disapplies s 137(1) to persons within Div 4.

6. But these observations, while accurate, cannot bear the interpretive weight needed to make this construction good. They ignore the fact that s 133AB(3)(d) specifically identifies bringing 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.* They make a virtue of the generality of s 137(1)'s language when that very generality indicates that the specific identification of a period of detention in s 133AB should be given primacy. Especially is that so when Div 4AA was enacted after s 137(1).

7. Section 137(1) makes it plain that its terms are subject to the provision of any other Act permitting detention, and it is not to be supposed that the failure to say the same about other provisions of the PA Act gave unyielding primacy to s 137(1) within the four walls of that Act. Section 137(1) is better read as the standing default rule, which can be modified from time to time as the legislature sees fit.

8. Most tellingly of all, the NT's construction results in Div 4AA doing nothing at all. On this construction, it equips members of the Police Force with no powers they did not already possess. Amendments, like any legislative provision, are generally assumed to have some work to do.

Cases where there is no realistic prospect of bringing the person to court

9. The NT's submission that the purpose of the arrest and detention is to ensure that the person is available to be dealt with by the courts (DS at [23]) fails to have regard to the cases where the only realistic options at the time of arrest, or shortly afterwards, are

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2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382 [70].

either to hold the person and then release them unconditionally or to hold the person and release them with an infringement notice.[3] In such a case, the purpose of holding the person in police custody for up to four hours must be something other than ensuring they are available to be dealt with by the courts.

The purpose of the regime

10. The NT's submissions (DS at [23], [31]) also ignore the purpose of the "paperless arrest" regime, as explained by the Attorney-General when introducing the Bill, and as evident from its text and structure. That purpose is to save police time by not having to charge people and take them to court.

10 *The disproportionate nature of the regime*

11. Finally, the NT's submissions do not address the disproportionate nature of the regime. The NT contends that the purpose of holding the person is to decide which of four options to pursue. Even if this were the case (and, in many cases, the choice would already have been made, or there would only be two realistic options, neither of which involves the court), it does not address the disproportionate nature of the regime. How can it be reasonable to arrest and hold a person for up to four hours in order to decide whether (for example) to issue them with an infringement notice for $49 or charge them with an offence carrying a maximum penalty of a fine but no jail time?

20 12. Moreover, the process of arrest and detention necessarily involves being searched by police, handcuffed, having property removed and bagged and being made to take shoes and socks off. These processes are designed for the arrest and detention of criminals and they involve a serious infringement of personal liberties that should only be tolerated where they are absolutely necessary.[4] These processes are disproportionate in the case of many infringement notice offences.

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3 See, eg, *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016, where the police officer completed the infringement notice by the time they had arrived at the watch house: at [74]. Similarly, in the case of the second plaintiff, Miranda Bowden, the infringement notice is dated 19 March 2015 and she was not released from detention until 20 March 2015, indicating a choice made at an earlier stage to proceed by way of infringement notice. **(SCB 41-42, 160)**

4 *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 at [69].

Federal jurisdiction and territory jurisdiction

13. The NT, the Commonwealth and the ACT make much of the decisions of this Court holding that the exercise of legislative power by a territory legislature is not to be treated as the exercise of legislative power by the Commonwealth Parliament.[5] But the contrasting results in *Capital Duplicators Pty Ltd v Australian Capital Television [No 1]* and *Svikart v Stewart* make the point that the treatment of territory legislatures vis-à-vis the Commonwealth can vary from constitutional provision to constitutional provision. To state that the NT legislature is no delegate of the Commonwealth Parliament is to overlook the context within which the issue is presented for determination: purported exercises of judicial power and the implications of Ch III.

14. It may be accepted that s 122 is "wide enough to permit Parliament to endow a territory with separate political, representative and administrative institutions"[6] and to create courts that are not required to comply with s 72 of the Constitution.[7] But the question is whether the Commonwealth Parliament can not only give birth to a separate self-governing territorial legislature but also breathe life into a species of judicial power ("territorial" judicial power) which is not contemplated by Ch III of the Constitution. This question was not presented, and therefore not answered, in *North Australian Aboriginal Legal Aid Service Inc v Bradley*.[8] What the Court did do in that case was discard the view in *Spratt v Hermes*[9] and *Capital TV and Appliances Pty Ltd v Falconer*[10] that territory courts never exercise federal jurisdiction.

Kable

15. The principal objection to the plaintiffs' *Kable* argument articulated by those opposing it is that it seeks to extend the application of the *Kable* principle.[11] But this is not an objection of substance. An extension of the principle's *application* is not an extension of the principle itself, and the plaintiffs' argument is based on an orthodox

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5 DS at [16(c)]; Commonwealth at [46]; ACT at [15]-[18], [26]. See *Capital Duplicators Pty Ltd v Australian Capital Television [No 1]* (1992) 177 CLR 248; *Svikart v Stewart* (1994) 181 CLR 548.

6 *Berwick v Gray* (1976) 133 CLR 603, 607 (Mason J).

7 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

8 (2004) 218 CLR 146.

9 (1965) 114 CLR 226.

10 (1971) 125 CLR 591.

11 DS at [45], Commonwealth at [51.4], NSW at [13], Qld at [10]-[11].

understanding of its constitutional underpinnings. The principle is concerned with the impairment of a court's institutional integrity, and is not limited to particular ways in which such impairment might occur. It is not limited to the *conferral* of certain powers or functions on courts or judges.[12]

16. Institutional integrity can be impaired in a variety of ways, and there is no principled reason why an impairment resulting from usurpation of the courts should be treated any differently to an impairment resulting from the conferral of a particular power on a court. Indeed, to suggest that the *Kable* principle cannot extend beyond the conferral of powers or functions would be to confine the principle in a manner inconsistent with its doctrinal foundation. As was said in *Kuczborski*, "[w]hether a law is invalid by reason of the *Kable* principle depends on the effect of the law upon the functioning of the courts."[13] It is the impact on the courts that matters, not the manner by which that impact is created.

17. The plaintiffs contend that Div 4AA affects the functioning of NT courts by undermining or usurping their role. In rejecting this submission, the NT relies heavily on the argument that the detention of a person falling within s 133AB is subject to s 137.[14] For the reasons set out above, that construction is incorrect and the comparison is misplaced. As a result, the courts have no real role to play in the detention of a person under s 133AB(2)(a) during the period of detention. That a detained person might *later* be able to commence proceedings for damages for false imprisonment[15] is not a satisfactory answer to the circumscription of the court's role in relation to the detention itself.[16]

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12 Contra Commonwealth at [51.4], Qld at [7]-[8].

13 (2014) 314 ALR 528 at [231] (Crennan, Kiefel, Gageler and Keane JJ).

14 DS at [29], [46].

15 In this regard, see Qld at [30], WA at [55].

16 Cf *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [4].