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

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.

PART III: REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: STATUTORY PROVISIONS

4. The relevant constitutional and statutory provisions are set out in Annexure A to the plaintiffs' submissions and Annexure A to the defendant's submissions.

Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland (Intervening)
Form 27c
Dated: 13 August 2015
Per Wendy Ussher
Ref PL8/ATT110/3297/NAF

Document No: 6106636

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PART V: ARGUMENT

(a) Summary

5. The Attorney-General adopts the submissions made on behalf of the defendant, particularly in relation to the construction of division 4AA of part VII of the *Police Administration Act* (NT).

6. The Attorney-General further submits that, even if the plaintiffs' construction of the legislation is preferred, nothing in division 4AA infringes the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

(b) Statement of Argument

(i) Scope of the Kable *principle*

7. In *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ reasoned (at 185 [40]):

> The principle for which *Kable* stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, 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.

8. This formulation of the principle was adopted by Crennan, Kiefel, Gageler and Keane JJ in *Kuczborski v Queensland* (2014) 314 ALR 528 at 562-563 [139].[1]

9. Division 4AA confers no functions on the Supreme Court of the Northern Territory, nor any other court. Indeed, it has no effect upon territory courts at all. In those circumstances, it is difficult to see how division 4AA could impair the institutional integrity of territory courts so as to render them unsuitable repositories of federal jurisdiction.

10. However, the plaintiffs claim that the *Kable* principle:

    (a) is not limited to situations involving an attempt to confer a particular duty or function on a state or territory court, and

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[1] For references to the *Kable* principle being concerned with the *conferral* of functions, see: *Kuczborski v Queensland* (2014) 314 ALR 528 at 542 [38], 544 [45] (French CJ), 555 [102] (Hayne J), 585 [265] (Bell J) ('*Kuczborski*'); *Pollentine v Bleijie* (2014) 311 ALR 332 at 341 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67] (French CJ), 89 [123] (Hayne, Crennan, Kiefel and Bell JJ) ('*Condon*'); *Momcilovic v The Queen* (2011) 245 CLR 1 at 66-67 [92]-[93] (French CJ), 174 [436] (Heydon J), 224-225 [593] (Crennan and Kiefel JJ), 241 [661] (Bell J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-210 [44]-[47] (French CJ and Kiefel J); *Hogan v Hinch* (2011) 243 CLR 506 at 541 [45] (French CJ); *Totani v South Australia* (2010) 242 CLR 1 at 47 [69] (French CJ), 156 [425] (Heydon J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] (Gleeson CJ), 595 [32] (McHugh J), 617 [101] (Gummow J), 628 [141] (Kirby J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103 (Gaudron J) ('*Kable*').

(b) extends to situations where state or territory legislation 'usurps' or 'undermines' the courts.[2]

11. Those submissions should be rejected for at least three reasons.

12. First, the plaintiffs' submission that *Kable* invalidates legislation which 'usurps' the role of Northern Territory courts wrongly conflates *Kable* with the doctrine of the separation of judicial power.[3]

10 13. The plaintiffs note that there can be no single or comprehensive statement of the content of the 'essential notion' of 'repugnancy to or incompatibility with' the institutional integrity of state courts.[4] So much may be accepted. However, that does not mean that the concept is devoid of definition or limitations. One clear limitation is that the repugnancy doctrine 'does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Chapter III'.[5] As explained by Hayne J in *Kuczborski* (2014) 314 ALR 528 at 555-556 [104]:[6]

> [B]ecause the repugnancy doctrine does not imply into the constitutions of the states the separation of judicial power required for the Commonwealth by Ch III, there can be no direct application to the states of all aspects of the doctrines that
20 have been developed in relation to Ch III. The repugnancy doctrine cannot be treated as simply reflecting what Ch III requires in relation to the exercise of the judicial power of the Commonwealth. Hence, *there can be no direct and immediate application of what has been said*[7] *in the context of Ch III about the 'usurpation' of judicial power.* But, as the decisions in *Kable, International Finance Trust Co Ltd v New South Wales Crime Commission, South Australia v Totani* and *Wainohu v New South Wales* show, not only the task which is given to a state court, but also the manner in which the court is required to perform the task, may require the conclusion that the legislation in question is invalid.
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> (emphasis added; some footnotes omitted)

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14. Secondly, the plaintiffs' reliance on the statements in the authorities regarding legislation which deprives courts of 'defining or essential characteristics' is misplaced.[8]

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[2] Plaintiffs' submissions at [54].

[3] Despite the frequency with which reference is made to the 'separation of powers', it is submitted that in the present context the phrase 'separation of judicial power' is more apt and should be preferred. See the discussion in *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278-280 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[4] Plaintiffs' submissions at [55], citing Hayne J in *Kuczborski* (2014) 314 ALR 528 at 556 [106].

40 [5] *Condon* (2013) 252 CLR 38 at 89 [124] (Hayne, Crennan, Kiefel Bell JJ), quoting *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 614 [86] (Gummow J). See also *Condon* (2013) 252 CLR 38 at 53 [22] (French CJ); *Totani v South Australia* (2010) 242 CLR 1 at 45 [66] (French CJ), 81 [201] (Hayne J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598-599 [37] (McHugh J); *Kable* (1996) 189 CLR 51 at 67 (Brennan CJ), 77-80 (Dawson J), 95 (Toohey J).

[6] Hayne J was in dissent in *Kuczborski*. Nonetheless, it is submitted that these comments are uncontroversial, particularly given their similarity to comments made by Hayne, Crennan, Kiefel and Bell JJ in *Condon* (2013) 252 CLR 38 at 89-90 [124]-[126].

[7] See, for example, *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26-29 (Brennan, Deane and Dawson JJ).

[8] Plaintiffs' submissions at [54].

15. It may readily be accepted that legislation conferring a function on a state or territory court may deprive that court of a defining characteristic, and that *Kable* will invalidate such legislation. For example, in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, it was the function conferred on the Supreme Court of New South Wales by s 10 of the *Criminal Assets Recovery Act 1990* (NSW) which deprived the Supreme Court of 'an essential incident of the judicial function'.[9]

16. It is necessary, however, to understand precisely the meaning and significance of 'defining characteristics' in this context. It is a concept used to elucidate whether legislation has affected a court's institutional integrity. In *Condon* (2013) 252 CLR 38, French CJ said (at 71 [67]):

> The institutional integrity of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision-making bodies. The defining characteristics of courts include:
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> - the reality and appearance of decisional independence and impartiality;
> - the application of procedural fairness;
> - adherence to the open court principle;
> - the provision of reasons for the court's decision.
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> ...
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> The defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms. *They are used to describe limits, deriving from Ch III of the Constitution, upon the functions which legislatures may confer upon State courts and the commands to which they may subject them.*
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> (emphasis added)

17. While the list of defining characteristics offered by French CJ is not exhaustive, it is to be expected that other 'defining characteristics' would be of the same essential nature. That is, all 'defining characteristics' are likely to be concerned with ensuring that courts continue to exercise their functions fairly, independently and transparently.

18. By contrast, it has never been suggested in a *Kable* context that some part of a court's jurisdiction might be a 'defining characteristic'. Doubtless this is because s 77(iii) of the *Constitution* refers to '*any* court of a State' and each court will have a different jurisdiction. As recognised in *K-Generation Pty Ltd v Liquor Licensing Court*, the *Kable* principle applies to all state courts, not only the Supreme Court.[10] The plaintiffs' suggestion that the failure to confer a particular jurisdiction on one or more territory courts deprives those courts of a 'defining characteristic' and infringes the *Kable* principle must therefore be rejected.[11]

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[9] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [56] (French CJ).

[10] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 543-544 [152]-[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[11] Respectfully, the plaintiffs not only misunderstand the concept of 'defining characteristics' as applied in *Kable* cases, but also seek to elide the distinction between the *Kable* principle and the principle emerging from *Kirk v*

19. Thirdly, as the plaintiffs seek to apply it in this case, the extended *Kable* principle would invalidate a law which grants power to an executive agency and makes no provision in respect of courts. On the plaintiffs' argument, that law would be invalid because of a failure of the legislature to '*provide* for judicial oversight' of the power.[12] No authority on the *Kable* principle has ever suggested, however, that the principle might impose on state and territory legislatures an obligation to confer a function on courts.

(ii) Division 4AA does not undermine or usurp the role of the courts

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20. Even if the *Kable* principle does, in some circumstances, invalidate legislation which 'usurps' the role of the courts, it does not do so in this case. That is because any extended understanding of the *Kable* principle would have to be applied consistently with the principle's basic rationale: to forestall the undermining of the efficacy of the exercise of the judicial power of the Commonwealth.[13] *Kable* does this by ensuring that state and territory courts remain suitable repositories of federal jurisdiction.[14]

21. Division 4AA does not affect the suitability of courts as repositories of federal jurisdiction or the efficacy of the exercise of federal judicial power. It cannot, because it does not confer any function upon the courts, nor take from the courts any jurisdiction, nor make any change to the manner in which courts are to exercise their functions and powers.

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22. Further, the particular means by which the plaintiff says division 4AA 'usurps' the role of the courts are not means which are capable of affecting the institutional integrity of those courts.

23. The plaintiffs contend that division 4AA 'usurps' or 'undermines' the courts of the Northern Territory (and therefore impairs their institutional integrity) because:

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(a) 'there is no real possibility of a person detained under Div 4AA approaching a court during the period of detention'; and

(b) 'even if a detained person were able to approach a court, the court would be limited to reviewing the legislative criteria'.[15]

Industrial Relations Court (NSW) (2010) 239 CLR 531 ('*Kirk*'). While there may be overlaps between the two principles where Supreme Courts are concerned (as suggested by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]), the principles are distinct. The principle established by *Kirk* hinges upon the requirement found in s 73 of the *Constitution* that there be 'a body fitting the description "the Supreme Court of a State",' and hence applies only to those courts. It is therefore distinct from *Kable*, which is founded upon s 77(iii) of the *Constitution* and the need for *all* state courts to be and remain suitable repositories of federal jurisdiction. In respect of these matters, Queensland is content to adopt the plaintiffs' assumption that *Kirk* applies to the territories (see plaintiffs' submissions at [58]).

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[12] Plaintiffs' submissions at [58] (emphasis added).

[13] *Kable* (1996) 189 CLR 51 at 132 (Gummow J), cited with approval in *Kuczborski* (2014) 314 ALR 528 at 579 [228] (Crennan, Kiefel, Gageler and Keane JJ).

[14] *Baker v The Queen* (2004) 223 CLR 513 at 534 [51] (McHugh, Gummow, Hayne and Heydon JJ).

[15] Plaintiffs' submissions at [56].

24. Whether taken individually or in combination, these matters do not support the plaintiffs' contention about impairment of the courts' integrity.

No possibility of approaching a court

25. It is far from clear that there is a factual basis for the plaintiffs' claim that a person detained under division 4AA will be unable to approach a court during the period of detention.[16] Habeas corpus applications are given priority by the courts and have, for example, been heard and decided on the day of application.[17] But in any event, it is not necessary to examine this point because even if the plaintiffs' assertion is accepted, division 4AA does not usurp the role of the courts.

26. The plaintiffs suggest that there will be no judicial oversight of the detention authorised under s 133AB(2)(a) *because* the detention it authorises is for such a short period (four hours).[18] But in this respect, the operation of s 133AB(2)(a) appears to be no different from the previously existing s 137 (about which no complaint is made). Under s 137, a person could also be held in custody for four hours – or some shorter time – and then released without charge, without any real possibility of 'oversight' from a court.[19]

27. Further, the consequence of the plaintiffs' submission on this point is that the legislation would be valid if it authorised detention for some longer period (for example, four days). On the plaintiffs' argument, the legislation would then be valid because the person detained would have an opportunity to bring an application for habeas corpus, and would not be limited to the 'frail reed' of an action in false imprisonment. That consequence suggests that the plaintiffs' submission is wrong.

28. In any event, that practical obstacles exist which make it difficult for a person to obtain relief does not mean that the courts have been 'excluded' or 'usurped', or that a constitutional guarantee has been infringed.[20] The decision in *Kirk*, for example, does not prevent a state legislature from passing legislation which makes it more difficult to obtain judicial review, for example by removing the right to reasons,[21] repealing freedom of information laws,[22] or undoing procedural reforms so that the Supreme Court's review jurisdiction was limited to the common law writs, with their attendant procedural complexity.[23]

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[16] Cf Plaintiff's submissions at [13].

[17] See, for example, *Supriadin v Minister for Immigration and Citizenship* (2011) 122 ALD 138; [2011] NTSC 45 (24 June 2011). The application was made on 13 May 2011 and heard at 10am that day, immediately after which orders were pronounced.

[18] Plaintiffs' submissions at [13].

[19] Cf Plaintiffs' submissions at [10].

[20] *Totani v South Australia* (2010) 242 CLR 1 at 77-79 [191]-[195] (Hayne J),

[21] See, for example, part 4 of the *Judicial Review Act 1991* (Qld).

[22] See, for example, *Right to Information Act 2009* (Qld).

[23] For a discussion of the 'procedural complications attendant on the grant of the prerogative writs' and their removal by statutory reform, see Stephen Gageler, 'Administrative law judicial remedies' in Matthew Groves and HP Lee (eds), *Australian administrative law: Fundamentals, principles and doctrines* (Cambridge University Press, 2007) 368 at 370-373.

29. Indeed, the history of practical obstacles making the getting of prerogative relief more difficult is long. As noted in *Kirk* (2010) 239 CLR 531 (at 568 [59]), changes to what would suffice as the 'record' made by the *Summary Jurisdiction Act 1848* (UK) had the result that the 'face of the record spoke no longer: it was the inscrutable face of sphinx'.

30. The fact that the legislation authorises a period of detention so short that it does not give time to obtain judicial oversight of the detention does not render the legislation invalid. Particularly is that so where relief in relation to abuse of the power may still be obtained by an action in false imprisonment. To borrow a phrase from a different context, such legislation creates no 'island of power'; nor does it 'usurp' the role of the courts.

Review limited to legality of detention

31. The plaintiffs submit that the 'framework' of division 4AA also impairs the institutional integrity of Northern Territory courts because any review is limited to the 'legislative criteria', and 'the scope for meaningful judicial review of the detention is limited'.[24] What would amount to 'meaningful' judicial review is not explained.

32. It is difficult to see how limiting the courts to review of the 'legislative criteria' could be said to impair the courts' institutional integrity. Rather, limiting courts to review of legislative criteria – that is, to considering the *legality* of executive decision-making – is entirely consistent with the role of courts and reinforces, rather than undermines, their institutional integrity. As Brennan J said in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36:[25]

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. ...
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> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

33. Respectfully, the plaintiffs' reliance on the long-standing availability of the writ of habeas corpus in common law systems is misplaced. Habeas corpus, like other forms of judicial review, is directed to the lawfulness of administrative action:[26]

> The writ of course merely considers whether or not a person has been lawfully detained. If the law permits a detention then an application for the writ will fail.

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[24] Plaintiffs' submissions at [59].

[25] See also *Totani v South Australia* (2010) 242 CLR 1 at 106-107 [273] where Heydon J noted that the unavailability of review of the *merits* of administrative action 'cannot affect constitutional validity'. His Honour was dissenting in that case but it is submitted that is an uncontroversial statement of principle.

[26] David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific* (Federation Press, 2000) at 122.

34. The writ of habeas corpus remains available in respect of detention under division 4AA. The fact that the terms of s 133AB might provide an answer to any application for habeas corpus does not make that section invalid. If it were otherwise, any state or territory law which purported to authorise detention by the executive would be invalid.

35. For those reasons, the courts' supervisory power in relation to detention under division 4AA is not 'eviscerated' by the failure to provide a court with an opportunity to consider, within the four hour period, the kinds of factors relevant in determining whether to grant bail.[27] Notwithstanding the habeas corpus roots of common law bail applications,[28] the jurisdiction to grant bail is now a matter entirely distinct from the courts' supervisory jurisdiction. Not least is this evident because an application for bail does not ask a court to consider the legality of a person's detention, but to make a discretionary decision about a person's release based on a variety of factors now prescribed by legislation.

36. In any event, it is not the case that, absent division 4AA, all persons arrested and detained in the Northern Territory would necessarily be brought before a court for 'meaningful' review of their detention and consideration of factors relevant to bail. For example, a person detained under s 137 (like a person detained under s 133AB) may be released by a police officer on bail, without reference to a court (see s 16 of the *Bail Act* (NT)).

37. For those reasons, the plaintiffs' submission that there is a constitutional difficulty with the failure to provide for 'meaningful' judicial review of the exercise of the power in s 133AB must be rejected.

PART VI: Time estimate

38. Queensland estimates that it will require approximately 30 minutes for the presentation of oral submissions.

Dated 13 August 2015.

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[27] Cf Plaintiffs' submissions at [56(b)].
[28] Clark and McCoy, above n 26 at 56.

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