IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M45 of 2015

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED (ACN 118017842)
First Plaintiff

and

MIRANDA MARIA BOWDEN
Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE AUSTRALIAN CAPITAL TERRITORY, INTERVENING

Part I:

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

Part II:

2. The Attorney-General of the Australian Capital Territory intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.

Part III:

3. Not applicable.

Part IV:

4. The applicable constitutional provisions, statutes and regulations are set out in Annexure A to the plaintiffs' submissions.

5. In addition, the following provisions are relied upon (and set out in Annexure A to these Submissions):

Filed on behalf of the Attorney-General of the Australian Capital Territory (intervening)

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- *Australian Capital Territory (Self-Government) Act* 1988 (Cth), ss 7, 22, Part VA
- *Supreme Court Act 1933* (ACT), s 20

Part V:

6. The intervention is limited to one issue that arises in the context of Question 1(a)(b) of the Questions Stated (Special Case Book, p 46): namely, whether the powers of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* (Cth) (***NT Self-Government Act***) are limited by the separation of powers enshrined in the Constitution.
7. Section 6 of the *NT Self-Government Act* confers on the Legislative Assembly of the Northern Territory the power to make laws for the peace, order and good government of the Northern Territory.
8. The Legislative Assembly of the Australian Capital Territory enjoys a similar power under s 22 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) (***ACT Self-Government Act***).
9. In that regard, Question 1(a)(b) implicates the power exercised by the Legislative Assembly of the Australian Capital Territory under equivalent legislation.
10. This issue arises only in the event that this Court finds in favour of the plaintiffs on Question 1(a)(a) of the Questions Stated, regarding the characterisation of Division 4AA of Part VII of the *Police Administration Act* (NT) as purporting to confer judicial power on the executive. The issue need (and should) not be determined in the absence of such a finding: that is, where is it not necessary to determine the rights of the parties in this case, and in circumstances where there is no reason to depart from this general principle.[1]

Nature of Territory power

11. The Attorney-General of the Australian Capital Territory submits that the powers of the legislature of a self-governing Territory are not subject to the

[1] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [141].

doctrine of separation of powers that follows from the structure of the Constitution.

12. This is due to the position of the Commonwealth Parliament under the Constitution, as distinct from that of the legislature of a self-governing Territory. This is demonstrated by an examination of the nature of the power exercised by the Legislative Assembly of the Australian Capital Territory, which is akin to the power exercised by the Legislative Assembly of the Northern Territory under equivalent legislation.

Self-governing polity

13. The Australian Capital Territory was granted self-government in 1989 by the *ACT Self-Government Act*. The Act establishes the Australian Capital Territory as a "body politic under the Crown" (s 7).

14. Section 22 of the Act confers on the Legislative Assembly a general power to make laws for the peace, order and good government of the Territory. This is subject to certain exceptions (in Parts IV and VA of the Act), which are of no present relevance.

15. The effect of the creation of the separate Territory legislature was explained in *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators***) at 282, per Brennan, Deane and Toohey JJ:

> *The Legislative Assembly of the Australian Capital Territory has been erected to exercise not the Parliament's power but its own, being powers of the same nature as those vested in the Parliament.*

16. The fourth member of the majority, Gaudron J, expressed her agreement (at 284) that an enactment of the Legislative Assembly of the Australian Capital Territory is:

> *... enacted 'pursuant to a new legislative power' by a 'separate legislative body armed with general legislative authority' and thus cannot be regarded as an exercise of the legislative power of the Commonwealth.*

17. It was confirmed in *Svikart v Stewart* (1994) 181 CLR 548 at 562 (***Svikart***), per Mason CJ, Deane, Dawson and McHugh JJ, that the Legislative Assembly:

... 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.

18. Accordingly, in passing laws, the Legislative Assembly does not act as a delegate of the Commonwealth Parliament but instead as a separate legislative authority with the legislative power "of the same quality, as, for example, that enjoyed by the legislatures of the States": *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279, per Wilson J.[2]

19. The operation of Part VA of the *ACT Self-Government Act*, entitled 'The Judiciary', is not to be equated with Ch III of the Constitution. There is a requirement that "[t]he Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory" (s 48A), and there are limitations imposed on changes to judicial retirement age (s 48B) and removal from office (s 48D). Unlike the Northern Territory, the general jurisdiction of the Court is entrenched in the federal *Self-Government Act*.

20. The power of the Legislative Assembly to establish courts, including the Supreme Court, and to confer power on them lies entirely "in its general grant of authority under s 22 of the Self-Government Act", which is "relevantly unconfined":[3] *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 (***Eastman***) at [78].

21. It was held in *Eastman*, and "taken as settled" by six members of this Court in *Northern Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 (***Bradley***) at [31] that s 72 of the Constitution has no application to the Supreme Court of the Australian Capital Territory because that Court was not a court "created by the Parliament" within the meaning of s 72 of the Constitution. It is submitted that this 'settled' position applies equally to any

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[2] *Capital Duplicators* at 281-282, in relation to s 22 of the *ACT Self-Government* Act, referring to *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9, and *Powell v Apollo Candle Co* (1885) 10 App Cas 282 at 289.

[3] Save for the requirements of s 48A as to the original and appellate jurisdiction of the Supreme Court and for the limitations imposed by ss 48B and 48D on changes to judicial retirement age and removal from office.

other court created in the exercise of the power conferred on the Legislative Assembly by s 22 of the *ACT Self-Government Act*.

Investment of judicial power of the Commonwealth

22. It was accepted in *Bradley* (at [28]) that a court of the Territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament under s 122 of the Constitution. From this, certain propositions follow.

23. First, implicit in this acceptance is adoption of the view that a Territory court may be invested with federal jurisdiction within the meaning of s 71 of the Constitution. This is so, just as a Commonwealth law which vests in a State court jurisdiction to hear and determine a matter arising under a Commonwealth law is a law investing that court with "federal jurisdiction" within the meaning of s 77(iii) of the Constitution. In that regard, the nature of "the judicial power of the Commonwealth" remains the same irrespective of the court in which it is invested, and whether or not it is required to be constituted in accordance with s 72.

24. Secondly, the Court's finding in *Bradley* is antithetical to the plaintiffs' submission (para 29) that a Territory court "always and only" exercises federal judicial power. The occasional investment of judicial power by laws made by the Parliament is reflected in:

    a. s 48A(1) of the *ACT Self-Government Act* with respect to the Supreme Court, by virtue of the requirement that "[t]he Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory"; and

    b. s 48A(2), which provides, in addition, that the Supreme Court may have such further jurisdiction as is conferred on it by any Act, enactment or Ordinance or any law made under any Act, enactment or Ordinance.[4]

[4] This is reflected further in s 20(1)(b) of the *Supreme Court Act 1933* (ACT), which provides that the ACT Supreme Court has the jurisdiction conferred on it by a Commonwealth Act or a law of the Territory.

25. Thirdly, the Court's finding in *Bradley* is consistent with the proposition that the exercise of legislative power by the legislature of a self-governing polity, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power.

Ultimate link with Commonwealth legislative power (s 122)

26. That proposition is not undermined by an ultimate link between the exercise of the Territory's legislative power and the *ACT Self-Government Act* (being a law of the Commonwealth made under s 122 of the Constitution).[5] To hold otherwise would be to classify matters arising under laws made by a State legislature as matters "arising under" the Constitution by reason of the continuation of State laws and constitutions by ss 106-108 of the Constitution.

27. This view is consistent with the approach taken to Article III, section 2 of the United States Constitution, on which s 76(ii) of the Australian Constitution is based.[6] Article III, section 2, provides in part that the "judicial power shall extend to all cases, in law and equity, arising under ... the laws of the United States...". It has been held that, notwithstanding that the legislature of a self-governing Territory was established by a law of the Congress, and so derives its authority from the Federal Constitution and laws, the laws of the Territory are not laws "arising under" the laws of the United States.[7] The nature of the power to be established is not to be confused with the source of the authority to establish it.

28. The position of the Australian Capital Territory under the Constitution equates broadly with that of the States, both in relation to the limitations imposed on the exercise of the Commonwealth legislative power by the doctrine of

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[5] Cf. *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 (***Eastman***) at [40] (Gaudron J). However, in *Kruger v Commonwealth* (1997) 190 CLR 1 at 109, Gaudron J indicated that, while the judicial power of the Commonwealth in s 71 of the Constitution may extend to the determination of justiciable conflicts by application of laws enacted by the Parliament of the Commonwealth pursuant to s 122, it may be that different considerations apply to laws enacted by the legislature of a self-governing Territory. This reservation was echoed by Gummow and Hayne JJ in *Eastman* at [69].

[6] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 797.

[7] *Puerto Rico v Russell & Co* 288 US 476, 484 (1933); *Republican Party of Guam v Gutierrez* 277 F 3d 1086,1092 (9th Cir. 2002); *Club Comanche v Government of Virgin Islands* 278 F 3d 250, 260 (3rd Cir. 2002).

separation of powers, on the one hand, and in relation to the absence of such limitations in relation to the exercise of State or Territory legislative power, on the other. Similarly, both State and Territory courts are bound by the doctrine in *Kable*, which protects the defining or essential characteristics of those courts as courts.

29. Accordingly, the doctrine of the separation of powers under the Constitution has nothing to say about the Legislative Assembly of a self-governing Territory vesting judicial power in a body which is not a court (and, subject to the operation of the doctrine in *Kable*, it has nothing to say about the Legislative Assembly vesting something other than judicial power in a body that is a court).

30. This is consistent with the approach taken to Article IV, section 3(2) of the United States Constitution, upon which s 122 was broadly modeled, and which provides, in part, that: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States ...". Article III, section 2, has not been interpreted as requiring the separation of judicial power in the Territories.[8]

31. As has been consistently held in the Australian Capital Territory,[9] and which finding underpins the establishment and operation of ACT courts and tribunals,[10] it is within the power of the Legislative Assembly to enact

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[8] *American Insurance Co v Canter* 26 US 511, 546 (1928); *McAllister v United States* 141 US 174, 195 *et seq* (1828); *Clinton v Englebrecht* 80 US 434, 447 (1871); *Northern Pipeline Construction Co v Marathon Pipe Line Co* 458 US 50, 64-65 (1982). Story, *Commentaries on the Constitution of the United States* (5th ed., 1891), vol II, p 204. Note observations to this effect in *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 476 (Higgins J).

[9] For example: *Merrilees v R* [2014] ACTCA 10 at [14]; *Brown & Commonwealth of Australia and Anor (Residential Tenancies)* [2013] ACAT 56 at [49]; *Jacka v Australian Capital Territory and Anor* [2013] ACTSC 199 at [32]); *Lewis v Chief Executive of the Department of Justice and Community Safety* [2013] ACTSC 198; (2013) 280 FLR 118 at [292]-[354]; *Zarew & Johnson v Australia Post (Civil Disputes)* [2009] ACAT 19 at [57]; *Sleiman v Murray* [2009] ACTSC 82 at [29]; *Kithock Pty Limited v The Commissioner for Australian Capital Territory Revenue* [1999] ACTSC 144 at [6]; *Tony De Domenico v Margot Marshall* [1999] ACTSC 1 at [18]; *The Queen v Garry Kenneth McKay and the Queen v Darren John West* [1998] ACTSC 128 at [16]-[18].

[10] This includes the Supreme Court/Court of Appeal of the Australian Capital Territory (*Seat of Government Supreme Court Act 1933* (Cth), s 6; *Supreme Court Act 1933* (ACT), s 3); Court of Petty Sessions/Magistrates Court/Coroner's Court/Children's Court (*Court of Petty Sessions Ordinance* 1930 (ACT), s 17; *Magistrate's Court Act 1930* (ACT), s 4, Ch 4A; *Coroner's Ordinance* 1956 (ACT), s 5; *Coroner's Act 1997* (ACT), s 4); ACT Civil and Administrative Tribunal (*ACT Civil and Administrative Tribunal Act 2008* (ACT), s 88), which assumed the work of several existing

legislation which establishes bodies that exercise both judicial and administrative powers, and to create bodies which, although given an administrative title, exercise powers which are essentially judicial in nature. To hold otherwise would have significant consequences in respect of convictions and other judgments delivered by Territory courts, as well as decisions made by Territory tribunals and administrative bodies, since *R v Bernasconi* (1915) 19 CLR 629.

32. While such consequences do not alter the meaning of the Constitution, the inconvenience or impracticality is such that only the clearest constitutional language could compel them.[11] Nothing in the language of Ch III compels such an outcome.

The plaintiffs' argument

33. In terms of drawing an implication from the structure of the Constitution, the plaintiffs have not demonstrated the logical or practical necessity for the preservation of the integrity of that structure, which would dictate the limitation for which the plaintiffs contend.[12]

34. The plaintiffs' argument for limitation of Territory power contains four essential propositions:

    a. There is not a 'wholesale disconnection' between Ch III and the Territories (Plaintiffs' submissions, paras 20, 22).

    b. The exercise of power under s 122 is limited by the separation of judicial from executive and legislative powers effected by Ch III (para 22).

    c. There is no indication in Ch III, which provides for the judicial power of the Commonwealth, that its operation should be limited to the Commonwealth's legislative powers in s 51 (para 23).

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tribunals and boards, including the Administrative Appeals Tribunal, Small Claims Court, Discrimination Tribunal, Guardianship and Management of Property Tribunal, Mental Health Tribunal, Residential Tenancies Tribunal, Liquor Licensing Board, Health Professions Tribunal, and Legal Practitioners Disciplinary Tribunal.

[11] *Abebe v The Commonwealth* (1999) 197 CLR 510 at [44] (Gleeson CJ and McHugh J).

[12] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169 (Brennan J), 231 (McHugh J); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 152 (Gummow J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [183] (Gageler J).

d. There is a 'further analytical step' that when legislation is enacted by a self-governing Territory, any restriction on the Parliament applies to restrict the legislative power of that Territory (para 27).

Intersection of Ch III and s 122

35. In relation to the first proposition, the plaintiffs do not take issue with the finding that a court created by the legislature of a self-governing Territory is not a "federal court" within the meaning of Ch III (Plaintiffs' Submissions, paras 20, 25, fn 34). However, the plaintiffs argue that Ch III is not wholly irrelevant to s 122 on the basis that Territory courts can receive federal jurisdiction, which brings them within the *Kable* doctrine (para 20).

36. As much may be accepted without leading to the second proposition that s 122 is limited by the separation of powers implied from Ch III. Accepting that s 122 may be qualified by parts of the Constitution[13] does not lead ineluctably to the conclusion that it is qualified by Ch III (or an implication arising from that chapter). It has been held that Ch III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and which has no application to Territories.[14]

37. The plaintiffs take issue with that finding, citing for example, *Kruger v The Commonwealth* (1997) 190 CLR 1 (***Kruger***) (Plaintiffs' Submissions, para 22). However, it was acknowledged in *Kruger* by Gaudron J (at 109) that, even if one were to accept that the "judicial power of the Commonwealth" in s 71 of the Constitution extended to the determination of justiciable conflicts by application of laws enacted by the Parliament of the Commonwealth pursuant to s 122, different considerations may apply to laws enacted by the legislature of a self-governing Territory.[15]

38. In that regard, the question is not whether the Commonwealth can create a Territory legislature with powers beyond that which the Commonwealth can

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[13] See, for example, *Capital Duplicators Pty Limited v Australian Capital Territory* at (1992) 177 CLR 248 at 272-273; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [86] (French CJ), [189] (Gummow and Hayne JJ).

[14] *R v Bernasconi* (1915) 19 CLR 629 at 635 (Griffith CJ) (where it was held that s 122 was not restricted by s 80 of the Constitution).

[15] The point was borne out in *Eastman* at [69] *et seq* (Gummow and Hayne JJ).

give.[16] This matter is not concerned with limitations on the legislative power of the Commonwealth exercised pursuant to s 122 of the Constitution,[17] but rather a challenge to the validity of a law made pursuant to the plenary power of the Northern Territory Legislative Assembly.

39. The question is whether the limitation on Commonwealth legislative power that arises from the structure of the Constitution, and to which Ch III gives effect in so far as the vesting of judicial power is concerned,[18] applies also to the powers of a self-governing Territory Legislature (which powers emanate ultimately from the exercise of Commonwealth legislative power). To the extent that Ch III is concerned with jurisdiction in relation to the division of powers between a central and local State legislature, that limitation does (and should) not apply to the 'disparate' Territories.

40. The plaintiffs argue that the underlying purposes of the implication of the separation of powers – regarding the rule of law and protection of the liberty of the individual - have significance for the Territories (para 24). That may be so, but there are other protections, including by way of the safeguards of due process found in the common law, and the operation of the doctrine in *Kable*, which speak to those objectives.[19]

Ch III not limited to Commonwealth legislative power (s 51)

41. Similarly, the plaintiffs' third proposition that there is no indication in Ch III that its operation should be limited to the Commonwealth's legislative powers in s 51 (para 23)[20] does not answer the question of the exercise of legislative power by a self-governing Territory. Nor does it take account of the (exclusive) power of the Parliament in s 52(i) of the Constitution to make laws for the peace, order, and good government *of the Commonwealth* with

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[16] cf. *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 284, per Gaudron J.
[17] Cf. *Spratt v Hermes* (1965) 114 CLR 226.
[18] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ).
[19] See, for example, *Leeth v Commonwealth* (1992) 174 CLR 455 at 4669-470 (Mason CH, Dawson and McHugh JJ); *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] (French CJ), 66[149] (Gummow J), 160 [436] (Brennan and Bell JJ), 173 [481] (Kiefel J).
[20] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ), 54-55 (Gaudron J).

respect to the seat of government, whose operation would be limited by Ch III. As was held in *Svikart* (at 561), the power under s 122 is not made subject to the Constitution as is the power to make laws with respect to the seat of government under s 52(1).[21] Moreover, the power to make laws with respect to the seat of government would seem to be concerned with its political or constitutional aspects, rather than with the government of the Territory which it occupies. This is indicated, not only by the presence of s 122, but also the fact that, unlike the power under s 122, the power to make laws with respect to the seat of government is expressed to be a power to make laws for the peace, order and good government of the Commonwealth.

Stream cannot rise above its source

42. The plaintiffs' fourth proposition proceeds on the assumption that Ch III applies to s 122, and acknowledges (with reference to *Kruger* and *Eastman*) that a "further analytical step" is necessary where, as here, legislation is enacted by a self-governing Territory. This is the critical point of departure and, it is submitted, a leap that cannot be made.

43. It is made purportedly on the basis that there is a 'general principle' in Australian constitutional law that the 'stream cannot rise above its source'" (Plaintiffs' Submissions, para 28). The plaintiffs cite Griffith CJ in *Heiner v Scott* (1914) 19 CLR 381 at 393 as authority for the 'general principle', although it is clear that this principle has been developed in the context of a series of cases leading with *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 (***Australian Communist Party case***) at 258, per Fullagar J. The emphasis in either case is somewhat different.

44. Nevertheless, whether one takes that principle as one prohibiting:

    a. the conferral by the Parliament of a function upon its instrument which is not a function of the Commonwealth conferred by the Constitution (*Heiner v Scott*); or

    b. the legislature from determining conclusively for itself its power to enact legislation by putting beyond examination compliance with the

[21] This was adopted by Gummow and Hayne JJ in *Eastman* at [82].

constitutional limits upon that power (*Australian Communist Party case*; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640),

reliance on the principle here is misplaced.

45. Reliance on the first principle assumes a vertical relationship between principal and agent. Yet, the plaintiffs acknowledge that the Territory legislature is not the agent or delegate of the Parliament (para 27). In any event, as explained above, the issue is not Parliament granting a power greater than it possesses, but whether the limitation that attaches to the legislative power of the Parliament by way of an implication arising from the Constitution, attaches also to the legislature of a self-governing Territory. In that regard, the plaintiffs misconceive the constitutional imperative that gives rise to the separation of powers. That command, assigning the judicial power of the Commonwealth to courts insulated from legislative or executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole (with particular reference to the "logical inferences" to be drawn from Chs I, II and III and the form and content of ss 1, 61 and 71).[22]

46. The separation of judicial power was not an established feature of the constitutional position of the Australian colonies before federation nor of the Australian States after federation.[23] The failure of the Constitution to provide for separated judicial power in the Territories therefore placed Australian citizens resident in the Territories in no different position from those resident in the States.

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[22] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[23] *Dill v Murphy* (1862) 1 W & W (L) 432 at 362; *Clyne v East* (1967) 68 SR (NSW) 385, affirmed in *Building Construction Employees & Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 (CA) at 381; *Nicholas v Western Australia* [1972] WAR 168 at 173; Gilbertson v South Australia (1976) 15 SASR 66 at 84-85 (Bray CJ), 109-110 (Zelling J); *City of Collingwood v Victoria* [1994] 1 VR 652 at 663-664; *Kotsis v Kotsis* (1970) 122 CLR 69 at 76 (Barwick CJ); *R v Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15 at 22; *Mabo v Queensland* (1988) 166 CLR 186 at 202 (Wilson J; Mason CJ concurring at 195). Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 720; Moore, *The Constitution of the Commonwealth of Australia* (2nd ed., 1910), pp 95-96.

47. The Constitution vests the legislative, executive and judicial powers respectively in distinct organs.[24] Chapter III is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested.[25] That statement (and its raison d'être) speaks to the Commonwealth at the apex of the federal structure, with the full power and functions which the Constitution authorises. It has nothing to say about the plenary and relatively unrestricted power of the Territories.[26]

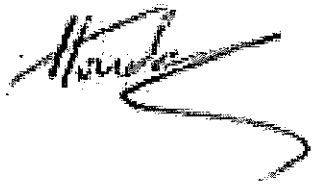
48. Reliance by the plaintiffs on the *Australian Communist Party case* is inapt on its terms: it simply does not arise in the present case (see Defendant's Submissions, para 18, fn 33).

49. The plaintiffs conclude that the "better view" is that Territory courts always and only exercise federal jurisdiction (Plainitffs' Submissions, para 29). As explained above, that proposition is at odds with the Court's finding in *Bradley*, and in any event, is not supported by the 'ultimate link' theory posited by the plaintiffs.

Part VI:

50. It is estimated that the presentation of oral argument will take 20 minutes.

Dated: 13 August 2015



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[24] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 797.
[25] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
[26] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 289-292 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

ANNEXURE A

FURTHER APPLICABLE PROVISIONS

The following provisions were in force at all relevant times and are still in force in the form set out in this annexure at the date of making these submissions.

***AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988* (CTH)**

Part II—Australian Capital Territory

7 Establishment of body politic

The Australian Capital Territory is established as a body politic under the Crown by the name of the Australian Capital Territory.

Part IV – Powers of Legislative Assembly

22 Power of Assembly to make laws

(1) Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory.

(2) The power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive.

Part VA—The Judiciary

48A Jurisdiction and powers of the Supreme Court

(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

(2) In addition, the Supreme Court may have such further jurisdiction as is conferred on it by any Act, enactment or Ordinance, or any law made under any Act, enactment or Ordinance.

(3) The Supreme Court is not bound to exercise any powers where it has concurrent jurisdiction with another court or tribunal.

48AA ACT laws may give concurrent jurisdiction to the Federal Court of Australia

Nothing in section 48A is to be taken to imply that a law of the Australian Capital Territory may not confer on the Federal Court of Australia original or appellate jurisdiction in any matter in respect of which, by virtue of section 48A, jurisdiction is conferred on the Supreme Court.

48B Retirement age of Judges etc. of the Supreme Court

(1) This section applies to the following offices:
   (a) Chief Justice of the Supreme Court;
   (b) Judge (other than additional Judge) of the Supreme Court;

(c) Master of the Supreme Court.

(2) An enactment that changes the retirement age in relation to an office to which this section applies does not affect the term of office of a person who was appointed to such an office before the commencement of that enactment unless the person has consented in writing to the application of the enactment to him or her.

48C Judicial commission

(1) An enactment relating to the establishment of a judicial commission for the Territory must provide that:

(a) the commission is to be constituted by persons who:

(i) have been Justices of the High Court or are, or have been, Judges of a superior court of record of the Commonwealth or of a State or Territory (other than persons who are Judges of the Supreme Court of the Territory appointed under subsection 7(1) of the *Supreme Court Act 1933* of the Territory); and

(ii) are appointed by the Executive for such terms as are determined in accordance with the enactment; and

(b) the commission is to have the function (whether alone or together with another body or authority of the Territory) of investigating, and reporting to the Attorney-General of the Territory on, complaints concerning the conduct or the physical or mental capacity of a judicial officer.

(2) A judicial commission may have functions in addition to the function mentioned in paragraph (1)(b).

48D Removal of a judicial officer from office

An enactment relating to the removal from office of a judicial officer must provide that:

(a) a judicial officer may only be removed from office if:

(i) a judicial commission appointed by the Executive to examine a complaint concerning the judicial officer has submitted to the Attorney-General of the Territory a report that:

(A) sets out the facts found by the commission in relation to the subject matter of the complaint; and

(B) states that, in the commission's opinion, the facts so found could amount to misbehaviour or physical or mental incapacity (as the case may be) warranting the officer's removal from office; and

(ii) the Assembly:

(A) has determined that the facts so found amount to misbehaviour or physical or mental incapacity identified by the commission; and

(B) has passed a motion requiring the Executive to remove the officer from office on the ground of that misbehaviour or incapacity; and

(b) a judicial officer may only be removed from office by the Executive in writing.

SUPREME COURT 1933 (ACT)

Part 2 Constitution and jurisdiction of the Supreme Court

20 Jurisdiction and powers of Supreme Court

(1) The court has the following jurisdiction:

(a) all original and appellate jurisdiction that is necessary to administer justice in the Territory;

(b) jurisdiction conferred by a Commonwealth Act or a law of the Territory.

(2) Unless it is required to do so by or under a Commonwealth Act or a law of the Territory, the court is not bound to exercise its powers if it has concurrent jurisdiction with another court or tribunal.