HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY OF AUSTRALIA

BETWEEN:

Chief Executive officer,
Aboriginal Areas Protection Authority
Appellant

- and -

Director of National Parks (ABN 13 051 694 963)
First Respondent

Attorney-General of the Commonwealth
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues on the appeal are: **(1)** whether the rule of construction associated with *Cain v Doyle* (1946) 72 CLR 409 (***Cain v Doyle***) remains good law? **(2)** Whether, and if so when, a statutory corporation associated with the Commonwealth enjoys the rule in *Cain v Doyle*? **(3)** Whether s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1987* (NT) (**Sacred Sites Act**) evinces a sufficient intention to apply its criminal norms to persons including the First Respondent, the Director of National Parks (**DNP**)?

Part III: Section 78B Notices

3. The Appellant has issued notices under s 78B of the *Judiciary Act 1903* (Cth): **CAB 109-112**.

Part IV: Reasons for judgement below

4. The citation for the decision below is *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1 (**J); CAB 33-94**.

Part V: Facts, Background and Constitutional framework

(A) Facts and Procedural Background

5. Gunlom Falls in Kakadu National Park (**Kakadu**) is land which is sacred to the Jawoyn Aboriginal people, and is a "sacred site" under the Sacred Sites Act: **J [10]; CAB 39 [10]**. It lies within the *buladjang* (Sickness Country) where the *bula* (creation spirit) sleeps: **J [22]; CAB 44 [22]**. The land is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) and held in fee simple by the Gunlom Aboriginal Land Trust (**Land Trust**) on behalf of the Jawoyn people: **J [22]; CAB 44 [22]**. It was leased to the DNP by the Land Trust on condition that it be a Commonwealth reserve jointly managed by the DNP and the Jawoyn people under a plan of management: **J [21]-[23]; CAB 43-44 [21]-[23], J [62]; CAB 73 [62]**.[1]

[1] EPBC Act, Part 15, Div 4, particularly s 362(1). The plan was made under s 370 of that Act.

6. The DNP is a corporation sole, established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) **(EPBC Act)** with functions including to develop land under joint management: ss 514C(2)(a), 514E(1)(a) and (c).

7. On 22 March 2019, the DNP engaged a contractor to construct a walking track at Gunlom Falls: **J [8]; CAB 39 [8]**. The works included excavating and clearing trees, rocks, soil and vegetation and inserting concrete steps: **J [9]; CAB 39 [9]**. The DNP caused those works to be undertaken without obtaining a certificate under the Sacred Sites Act from the Appellant, the Aboriginal Areas Protection Authority (**AAPA**) or the Minister: **J [11]; CAB 39 [11]**. Subject to certain defences, including the present constructional issue and any (as yet undetermined) operational inconsistency created by the EPBC Act, the DNP admits that its conduct constituted an offence against s 34(1) of the Sacred Sites Act: **J [12]; CAB 40 [12]**.

8. By complaint dated 11 September 2020, the Appellant charged the DNP with an offence against s 34(1): **CAB 5-21**. The DNP entered a plea of not guilty on the basis that, amongst other things, s 34(1) did not impose any criminal liability on it as a matter of construction or, alternatively, that it was beyond the legislative power of the Territory to do so. The Local Court stated a special case to the Supreme Court of the Northern Territory asking, relevantly, whether the offence and penalty in s 34(1) applied to the DNP: **J [2]; CAB 37 [2]**. That question was referred to the Full Court, which answered it "no": **J [3]; CAB 37 [3]**.

(B) Constitutional and Legislative Framework

9. By ss 4 and 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) (**SGA**), the Commonwealth established the Northern Territory of Australia as a separate body politic with plenary[2] legislative power, including the power to make laws applying to the Commonwealth, corporations associated with it, and their property: **J [86]; CAB 90-91 [86]**. The power to "make laws for the peace, order and good government of the

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[2] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 (the Court); *Svikart v Stewart* (1994) 181 CLR 548, 574 (Toohey J).

Territory" includes power to make laws which bind the officers or property of the Commonwealth,[3] including criminal laws of general application.[4]

10. The Sacred Sites Act is enacted pursuant to s 73(1)(a) of the ALRA, which confers a further, specific grant of legislative power upon the Territory Legislative Assembly. The ALRA was passed in response to the Woodward Royal Commission, which recommended sacred sites laws providing for a register of sacred sites, a permit system for works, and a "law of general application making it an offence knowingly to damage or desecrate a sacred site", including over "Crown lands".[5] Section 73(1)(a) was intended to allow the Assembly to "participate in this most important legislative process in particular in relation to the protection of sacred sites".[6] The grant of power is general, save that it is limited to laws which may operate concurrently with Part 15, Div 4 of the EPBC Act, which provides for the DNP's management of reserves.

Part VI: Argument

(A) Summary

11. Unadulterated by the rule in *Cain v Doyle*, the Sacred Sites Act exhibits an objective intention to bind all "persons" who interact with "sacred sites" in the Territory, regardless of whether they are associated with the Executive Governments of other polities: heading **(B)** below. The scheme of the Sacred Sites Act depends upon the deterrent effect of criminal prosecutions. The impact or effect of the criminal norms imposed by the Sacred Sites Act are no different for the DNP compared to other persons.[7] The scheme of the Act would be especially undermined if entities like the DNP were immune, particularly where Kakadu and Uluru-Kata Tjuta National Parks, which are rich in Aboriginal tradition, are jointly managed by the DNP under leases.

12. In the Full Court, the contrary conclusion was reached only by and because of *Cain v Doyle*. This appeal affords an appropriate opportunity to revisit *Cain v Doyle*. It will be

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3 *Margarula v Minister for Resources and Energy* (1998) 86 FCR 195 (FCAFC), 204F (the Court); *Pocock v Director of National Parks and Wildlife* (2001) 110 FCR 419, [76] (O'Loughlin J).

4 *Pirrie v McFarlane* (1925) 36 CLR 170, approved in *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 (***Henderson's Case***), 428 (Brennan CJ), 444 (Dawson, Toohey and Gaudron JJ), 472 (Gummow J). In the Territory, see *Svikart v Stewart* (1994) 181 CLR 548.

5 Justice A E Woodward, *Royal Commission into Aboriginal Land Rights*, Second Report, April 1974, [525], [527], [529] and [531].

6 Parliament, *Debates*, House of Representatives, 4 June 1976, p.3084 (Minister for Aboriginal Affairs).

7 As to the relevance of this, see e.g., *FCT v* ***Tomaras*** (2018) 265 CLR 434, [53] (Gordon J).

seen that *Cain v Doyle* is not, or was not applied by the Full Court as, a "presumption" properly so called; instead, it operates (like the pre-*Bropho* position) as a rigid rule of construction: heading **(C)** below. Upon analysis, none of the historical justifications for *Cain v Doyle* has any contemporary relevance or can sustain its rigidity as a rule of construction: heading **(D)** below. There are powerful reasons to abolish the rule, or alternatively limit the rule to the polity itself: heading **(E)** below. In any event, there were important errors in the Full Court's application of *Cain v Doyle*, which this Court should correct: headings **(F)-(H)** below.

13. The Appellant's primary submission is that, in place of *Cain v Doyle*, this Court should affirm that the ascertainment of intent to apply criminal norms to government should follow the same test as civil norms: i.e., whether all the circumstances indicate that the relevant offence provision should bind the government. Alternatively, the Court should hold that *Cain v Doyle* is limited to the "polity" itself. It does not have *greater* force when applied to other polities: heading **(F)** below; there is no reason to apply it for the benefit of Commonwealth statutory corporations: heading **(G)** below; and the *EPBC Act*, if it matters, discloses no specific intention to confer on the DNP the benefit of the rule either generally or when undertaking the functions in issue: heading **(H)** below.

(B) Text, Context and Purpose of the Sacred Sites Act

14. ***Purpose of the Sacred Sites Act.*** The Preamble to the Sacred Sites Act contains a statement of legislative purpose,[8] which is to be treated "a solemn and presumptively accurate declaration of why a law is enacted."[9] That purpose was to "effect a practical balance" between: **(a)** the preservation of Aboriginal cultural tradition; and **(b)** aspirations for economic, cultural and social advancement of Aboriginal and all other peoples of the Territory. As will be seen, the text of the Sacred Sites Act achieves that balance by creating procedures for the registration and protection of sacred sites throughout the Territory, backed by criminal sanctions applying universally to "persons", and where otherwise criminal conduct may be authorised by the granting of certificates following consultation with the custodians of sacred sites.

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8 Section 55 of the *Interpretation Act 1978* (NT) is silent about whether a preamble is part of an Act. At common law, a preamble forms part of an Act and (regardless of whether or not it is part of the Act) can be referred to in construction: Herzfeld and Prince, *Interpretation* (2nd ed, 2020), p.105 [5.70].

9 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, [118] (Gageler J).

15. ***Registration of Sacred Sites.*** Part III, Div 2 of the Sacred Sites Act creates a procedure, on application by a custodian of a sacred site (s 27(1)), for a site to be registered "as a sacred site for the purposes of this Act" where the Authority is satisfied, following investigation and representations, that the site "is a sacred site": s 29. "Sacred site" is defined by reference to the same term in the ALRA, namely as a site that is "sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition": Sacred Sites Act, s 4(1) and ALRA, s 3(1). Although the register is an important public resource, a site will be a "sacred site" regardless of whether it is registered. The Act applies to all sacred sites throughout the Territory, including on Crown land: **J [80]; CAB 86-87 [80]**.

16. ***Offences and Penalties.*** Part IV creates offences and penalties for a "person" to enter or remain on a sacred site (s 33), or (relevantly to this appeal) to carry out works on or use a sacred site: s 34(1). There are also offences for desecrating a sacred site (s 35), for failing to comply with a condition of a certificate (s 37), and for disrespecting cultural secrecy: s 38. In each offence provision, and throughout the Sacred Sites Act, the draftsperson uses the term "person". A "person" in Territory legislation includes a natural person, a body corporate or a body politic.[10] However, in the Territory, penal provisions must be read as only referring to bodies corporate and natural persons (not bodies politic).[11] Consistently with this, the Sacred Sites Act generally (and s 34(1) in particular) prescribes penalties for natural persons and corporations (e.g., the DNP), but not bodies politic. Accordingly, the Sacred Sites Act does not seek to expose the Commonwealth (as a body politic[12]) to a penalty. But any other "person" is so exposed.

17. ***Certificates.*** In respect of each offence, it is a defence if the person has a Certificate authorising the works. Part III (Div 1A, Div 1 and Div 3) provides for the issue, upon application by a "person" (s 19B), of "Authority Certificates" (or, after review, a "Minister's Certificate") to carry out work on or use land. If granted, the certificate entitles a person to "enter and remain" on the land, and to "do such things on the land as are reasonably necessary for carrying out that work or making use of the land": s 25. Importantly to the balance sought to be achieved by the Sacred Sites Act, the AAPA is

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10 *Interpretation Act 1978* (NT), ss 17 and 24AA(1).
11 *Interpretation Act 1978* (NT), s 38B and *Criminal Code Act 1983* (NT), Schedule 1, s 43BK.
12 *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1, [75] (Kiefel CJ, Bell, Gageler and Keane JJ), [126] (Nettle J) and [213] (Edelman J).

required to consult with the custodians of sacred sites before granting any certificate: s 19F. Applicants for certificates may also confer with custodians: ss 19G and 19L.

18. ***Normative Framework is Criminal.*** As seen above, the normative framework of the Sacred Sites Act is almost exclusively criminal. The regulatory regime is to: **(a)** prohibit certain conduct (Part IV); and **(b)** provide for authorisations of that conduct (Part III), where the sole purpose of the authorisation is to provide an excuse for what would otherwise be an offence.[13] It is difficult to identify any civil norms in the Sacred Sites Act: there is no civil obligation to register sacred sites (s 27(1)), nor to apply for an Authority Certificate (s 19B), nor to review the Register of Sacred Sites before conducting works: ss 10(d) and 48. The only basis for deterrence, and the only method for ensuring the "balance" which it was the legislature's intention to effect, is the ability to bring prosecutions.[14] Apart from criminal norms, the rights of custodians to be consulted (s 19F) and the stated purpose of preserving and enhancing Aboriginal cultural tradition in relation to certain land in the Territory are essentially aspirational.

19. ***Section 4.*** Section 4(1) provides that the Sacred Sites Act "binds the Territory Crown, and to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities". Because the norms of the Sacred Sites Act are almost exclusively criminal, s 4(1) means almost nothing unless it means that the "Crown" in all capacities is bound by the criminal norms created by the Act.

20. Sections 4(2)-(4) are *intra-mural* provisions. They concern the *process* for prosecuting the different parts of the Territory Government. To understand those provisions, it is first important to recognise that they divide the Territory Government into two groups: **(a)** "an officer, employee or agent" of the Territory Crown (s 4(3)); and **(b)** other organisations falling within the definition of "Territory Crown" in s 4(4). The first group is extremely broad: it is apt to capture all individuals (who will either be employees or officers) and all statutory corporations (who will be "agents"). For these persons, s 4(3) acknowledges that they are already liable to prosecution and ss 4(2)-(4) do not affect their liability. The second group is centrally comprised of "the Crown in right of the Territory", being the polity itself (as a legal person distinct from the other component parts of the Territory

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13 A certificate provides no authority to carry out the works beyond relaxing the prohibitions in Part IV: s 40(1); *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47, 50 (Gibbs CJ and Brennan J).

14 Legislative Assembly, *Debates*, 20 October 2005, p. 1062-1063.

Executive). But it is extended to include an "Agency"[15] and an "authority or instrumentality". These are the parts of the Territory Government that are unlikely to have independent legal personality.[16] In respect of the second group, s 4(2) provides that "the Territory Crown is liable *in that capacity* to be prosecuted for the offence *as if it were a body corporate*".

21. Section 4(2) is useful in two senses. ***First***, it creates a statutory fiction that the "Territory Crown" can be treated as a body corporate,[17] and is thus amenable to the corporate penalties prescribed by Part IV and the statutory principles of corporate criminal responsibility[18] (neither of which otherwise apply to bodies politic[19]). ***Second***, s 4(2) supplies a substratum of legal personality for governmental organisations ("Agencies", "authorities" or "instrumentalities": s 4(4)) whom the AAPA sees fit to prosecute but who could not otherwise be defendants to a prosecution because they lack legal personality. These entities are to be prosecuted in the name of the "Territory Crown" (i.e., the Northern Territory of Australia).[20] Where the entity otherwise has legal personality, and may sue and be sued in its own name, recourse to that fiction may be unnecessary. Sections 4(2)-(4) thus perform a function similar to that in s 5(2) of the *Crown Proceedings Act 1993* (NT), clarifying the name in which a proceeding may be brought for a Territory government entity that has no independent legal personality.[21] So understood, ss 4(2)-(4) do not support any negative implication for how any other polity within the Federation is to be prosecuted: contra **J [80]; CAB 86-87 [80]**.

22. ***Legislative History of s 4.*** Properly understood, the legislative history of s 4 confirms the foregoing construction. With respect, the Full Court's discussion of that legislative history (**J [74]-[78]; CAB 82-85 [74]-[78]**) was misinformed in that it overlooked that the 2005 amendments introducing ss 4(2)-(4) occurred in <u>two</u> phases. In the ***first*** phase,

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15 As to "Agencies", these will typically be government departments: *Interpretation Act 1978* (NT), ss 17 ("Agency"), 18A(1), 35(1) and (2).

16 Government departments in the Territory have no independent legal personality: *Jenkins v Department of the Attorney-General and Justice* [2017] NTCA 3, [2] (Grant CJ).

17 The Crown in right of the Territory is not a "body corporate" in the sense used in the criminal law: *Commonwealth v Baume* (1905) 2 CLR 405, 413 (Griffiths CJ, Barton J agreeing), 420 (O'Connor J).

18 *Criminal Code Act 1983* (NT), Schedule 1, Part IIAA, Div 5.

19 The Full Court said this would be otiose because it is the effect of the definition of "person" in ss 17 and 24AA(1) of the *Interpretation Act 1978* (NT): **J [73]; CAB 81-82 [73]**. That overlooked s 38B of that Act and
s 43BK of the *Criminal Code Act 1983* (NT), which restrict offences to natural persons and corporations.

20 This is, for example, the ubiquitous practice for industrial disputes: e.g., *Taylor v Commonwealth of Australia represented by the Department of Health* [2019] FCA 1587.

21 *Sangare v Northern Territory of Australia* [2018] NTSC 5, [98] and fn 4 (Grant CJ).

on 20 October 2005, the Bill[22] as introduced to the Assembly was in similar form to the current ss 4(2)-(4), save that it referred to "the Crown" rather than "the Territory Crown". It was to the Bill in this form that the Full Court referred: **J [78]; CAB 84-85 [78]**. But in the ***second*** phase of the amendment, on 1 December 2005, the Government invited the defeat of 2005 Bill in order to substitute a narrowed version of ss 4(2)-(4), which replaced the reference to "the Crown" with "the Territory Crown" as it presently appears.[23] Explaining this amendment, the Minister Assisting the Chief Minister On Indigenous Affairs said:

> The [Act] already binds the Crown, but, in this case, the law is not always clear. I am aware that we are going to invite the defeat of section 4, that part that applies to the Commonwealth and we will give an explanation about that later.[24] Case law indicates that individual employees and agents of the Crown are liable to prosecution already. This is made very clear in the amendment.
>
> This amendment also intends to make clear that agencies and authorities are liable to prosecution as well, and that is what did not occur in the previous act. It is important to understand that the reason why this act will be put into place is that indigenous people and organisations have become concerned over a very long time about the treatment of their sites and the potential for damage of those sites. It is sad to say that some the government agencies (sic) have been helpless to in certain circumstances. Normally, those sorts of things arise in regards to authority certificates. Essentially, what this amendment is trying to do is to ensure that, for instance, if a government agency or a government department deliberately, knowingly damages a particular site, then they too will be responsible, just as are other citizens of the Northern Territory. That is the new amendment that applies in this particular area.[25] (emphasis added)

23. The Hansard for 1 December 2005 makes clear that: (a) the core mischief to which ss 4(2)-(4) were directed was a lacuna that may arise where "government agency or a government department" without legal personality commits an offence; (b) the objective purpose of the amendment was to "make clear that agencies and authorities are liable to prosecution *as well*, and *that* is what did not occur in the previous act".

24. The substitution of "Crown" (in the October 2005 Bill) with "Territory Crown" (in the December 2005 Bill) was not explained, other than by saying that the Government was inviting the defeat of "that part that applies to the Commonwealth", and that "the

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22 *Northern Territory Aboriginal Sacred Sites Amendment Bill 2005* (NT).

23 Legislative Assembly, *Debates*, 1 December 2005, p.1352 (Mr McAdam, Minister Assisting the Chief Minister on Indigenous Affairs); *Northern Territory Aboriginal Sacred Sites Amendment Act 2005* (NT), s 4.

24 No explanation is subsequently recorded in the Debates.

25 Legislative Assembly, *Debates*, 1 December 2005, pp.1349 and 1351.

Solicitor-General has clarified the situation between the two governments."[26] The best interpretation of the (incomplete) parliamentary record is that the Assembly, through s 4(1) taken together with each of the provisions discussed in [14]-[18] above, objectively intended to apply the criminal norms of the Sacred Sites Act to all natural persons and bodies corporate who acted within its terms, irrespective of whether they are associated with any polity, whether the Territory, Commonwealth or otherwise. By the *final* form of ss 4(2)-(4), the Assembly went further in relation to the Territory itself by creating an intra-mural deeming mechanism by which the Territory as a polity could be prosecuted *as if* it was a body corporate under the general law. Had the Bill in its *original* form been enacted, it would have purported to apply its deeming mechanisms beyond the Territory and into the inner workings of the Commonwealth and other polities. As such, it might, arguably, have raised the type of *Cigamatic* issues which the Respondents (wrongly) pressed below: **J [82]-[91]; CAB 87-94 [82]-[91]**. In the amended form, the Territory avoided the possibility of any *Cigamatic* issues, and, pragmatically, reduced the risk of the Commonwealth enacting overriding legislation.

(C) Role for Presumptions

25. The Full Court did not undertake a conventional process of statutory construction in order to assess the objective intention of the Territory Legislature. Instead, its conclusion depended upon what it took to be the correct application of the rule in *Cain v Doyle*: **J [82]; CAB 87-88 [82]**, via three steps. At **J [39]; CAB 55-56 [39]**, the Full Court asked itself: ***first***, whether the DNP was an entity "to which the presumption … is capable of application"; ***second***, whether the DNP was intended *by the Commonwealth Parliament* to have "the same legal status as executive government in relation to the operation of the presumption"; and ***third***, whether the Sacred Sites Act "discloses a legislative intention to impose criminal liability on the Commonwealth executive government". That was an analytical framework which relegated the intention of the Territory legislature to the ***third*** stage of analysis, and did so in a cramped manner.

26. *Cain v Doyle* is typically expressed by saying that there is the "strongest presumption"[27] that a statute is not properly construed to impose criminal liability on "the Crown": e.g., **J [27]; CAB 46-47 [27]; J [82]; CAB 87-88 [82]**. The "presumption" is only displaced

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[26] Legislative Assembly, *Debates*, 1 December 2005, pp.1349 and 1351.
[27] *Cain v Doyle* (1946) 72 CLR 409, 424 (Dixon J).

by "clear expression" or "quite certain indications".[28] It operates the same way as the presumption against civil legislation binding the Crown used to operate, prior to *Bropho*: i.e., it is "elevated to a rule of construction that the Crown was only bound by a statute by express mention or necessary implication".[29] So understood, *Cain v Doyle* is more a rule of construction than a presumption.

27. Presumptions, properly so called, are not rules of law.[30] Instead, they are tools of construction by which inferences are drawn from the "common experience of legislative acts".[31] Presumptions, properly so called, are but one tool in the search for objective purpose. *Presumptions*, properly so called, will give way to other indicators of objective intention[32] and may, in the circumstances, be of only slight weight.[33] By contrast, it was the "stringency and inflexibility" of the pre-*Bropho* rule which this Court denied.[34]

(D) The Justifications for Cain v Doyle

28. A number of different justifications have been identified for the rule in *Cain v Doyle* over time. Almost all of those justifications lack any contemporary significance.

29. The ***first*** rationale for *Cain v Doyle* was the doctrine of Crown immunity; i.e., that the Crown is not liable for breach of a civil norm and this must be *a fortiori* for a criminal norm.[35] This rationale was central to the reasoning of the majority in *Cain v Doyle* – Dixon J describing it as a "fundamental constitutional principle".[36] *Cain v Doyle* cannot be sustained on this basis in modern times. Crown immunity is incompatible with the establishment of the judicial power of the Commonwealth as an essential element in the federal system. Australian polities do not have "Crown immunity" – instead, they are subjugated by s 75 of the *Constitution* to liabilities under the general law.[37]

30. Once "Crown immunity" is cleared away, so too are the "many and various consequences" which Dixon J feared might flow from a departure from the principle of

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28 Ibid.
29 *Jacobsen v Rogers* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
30 *Tomaras* (2018) 265 CLR 434, [100] (Edelman J).
31 E.g., *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, [95] (Edelman J).
32 E.g., *BHP Group Limited v Impiombato* (2022) 96 ALJR 956, [43] (Gordon, Edelman and Steward JJ).
33 *Bropho* (1990) 171 CLR 1 at 15-16, 23 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Tomaras* (2018) 265 CLR 434, [52] (Gordon J) and [104] (Edelman J).
34 See *Jacobsen v Rogers* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
35 *Cain v Doyle* (1946) 72 CLR 409, 417-418 (Latham CJ).
36 Ibid, 425 (Dixon J).
37 *Commonwealth v Mewett* (1997) 191 CLR 471, 545-546 (Gummow and McHugh JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [125] (Gageler J).

Crown immunity.[38] Even if it were once true that there was no "Court of summary jurisdiction with jurisdiction over the Crown and no summary procedure to which the Crown is amenable", that is no longer correct.[39] Although in some cases a fine or penalty would be payable "*by* the treasury" and go "*to*" the treasury, that is not the case for entities associated with a polity other than enacting polity or whose finances (like the DNP's[40]) are separated from consolidated revenue. In any event, a fine must be accounted for in the relevant department's expenditure (allowing for scrutiny of the cost of its activities[41]), and (together with a conviction) would mark public condemnation of the conduct. A conviction may also entitle the victim to restitution.[42] Lastly, although it may be "for the Crown to remit fines", that power is exercisable by the Vice-Regal officer on advice from the Executive Council, attracting the usual political scrutiny.[43]

31. A ***second*** justification for *Cain v Doyle* was the solecism that it is impossible for "the Crown" (as prosecutor) to prosecute "the Crown in right of the Commonwealth".[44] This justification overlooks the distinct senses in which "the Crown" is used.[45] The "Crown" as defendant in a criminal trial is the "Crown" as legal person, i.e., the polity. The "Crown" in *that* sense is not one of the "protagonists"[46] in a typical criminal trial. In modern times, criminal prosecutions are brought by statutory office-holders who are independent from the political process.[47] The AAPA exemplifies this.[48]

32. A ***third*** justification for *Cain v Doyle* is that the "the Crown" cannot *itself* be guilty of a criminal offence because of "the fundamental idea of the criminal law" that "breaches of the law are offences *against the King's peace*".[49] This justification is ahistorical.[50] After

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38 *Cain v Doyle* (1946) 72 CLR 409, 424-425 (Dixon J).

39 *Judiciary Act 1903* (Cth), s 67B, noting that a "cause" includes "criminal proceedings": s 2. See also *Local Court (Criminal Procedure) Act 1928* (NT), Part IV, Div 2.

40 EPBC Act, ss 514S and 514R.

41 P Hogg, P Monahan, W Wright, *Liability of the Crown*, 4th ed, 2011, Thomson Reuters, [15.14].

42 In *Cain v Doyle*, conviction alone would have been a useful remedy because it entitled the aggrieved worker to any fine imposed and compensation: C McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada*, 1978, Australian National University Press, 90.

43 See *Fines and Penalties (Recovery) Act 2001* (NT), s 117(1); *Interpretation Act 1978* (NT), s 34(1).

44 *Cain v Doyle* (1946) 72 CLR 409, 418 (Latham CJ).

45 E.g., *Sue v Hill* (1999) 199 CLR 462, [83]-[94] (Gleeson CJ, Gummow and Hayne JJ).

46 Cf., *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ).

47 *Price v Ferris* (1994) 34 NSWLR 704, 707-8 (Kirby P).

48 A prosecution under the Sacred Sites Act may only be brought by the AAPA (s 39), a body corporate separate to the Territory (s 5(2)) and relevantly immune from Ministerial direction (s 5(5)).

49 *Cain v Doyle* (1946) 72 CLR 409, 425 (Latham CJ).

50 See A Gray, 'Immunity of the Crown from State and Suit' (2010) 1 *Canberra Law Review* 1, 3-5.

the Norman conquest, the "King's peace" was used in a "stylised"[51] sense as meaning "the normal and general safeguard of public order".[52]

33. A ***fourth*** justification for *Cain v Doyle* was identified by Dixon J, who said that "the Crown acts only by its Ministers and servants". The idea of this seems to be that it is sufficient if the Minister and servants are *themselves* exposed to the criminal law where engaging in action which would constitute an "offence on the part of the Crown".[53] This reflects an individualist philosophy of criminal accountability, which does not accord with modern notions of criminal responsibility. Today, *deterrence* is properly seen as equally effective as against corporate entities, and *retribution* as equally meaningful against corporate entities.[54] In any event, this is not a proper justification for an interpretative presumption because it yokes the presumption to a particular philosophy of criminal accountability, rather than seeking to ascertain objective intention (i.e., the *legislature's* philosophy).

34. A ***fifth*** justification for *Cain v Doyle*, which has been identified in modern times, refers to "the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty".[55] As a justification for a presumption, this is conclusory reasoning. And its probative force depends entirely on what is meant by the "Crown". In *Bropho*, for example, the plurality said (our emphasis):

> "it simply would not occur to any legislature of this country that a failure to indicate by express words or necessary implication that the provisions of a Criminal Code or general criminal statute were applicable to servants of the Crown in the course of their duties as such would result in a situation where Crown servants were placed beyond the reach of the ordinary criminal law in so far as they were acting with the authority of the Crown."[56]

Thus, to say that it is "inherently unlikely" that a legislature would seek to render the "Crown" liable to a criminal penalty only begs the question of what is meant by the "Crown" in this context. As the Court recognised in *Bropho*, the "legislatures of this

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51 S.F.C. Milsom, Historical Foundations of the Common Law (2nd ed, 1981), p.404.

52 F. Pollock and F.W. Maitland, *The History of English Law before the time of Edward I* (CUP, 1898), vol 1, p.45; also Pollock "The King's Peace in the Middle Ages" (1900) 13 *Harvard Law Review* 177.

53 *Cain v Doyle* (1946) 72 CLR 409, 425 (Dixon J).

54 See generally Fisse and Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11(3) *Sydney Law Review* 468.

55 *State Authorities Superannuation Board v Commissioner of State Taxation* (1996) 189 CLR 253 (***SASB***), 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ) (emphasis added).

56 *Bropho* (1990) 171 CLR 1, 21 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

country" should not be understood to take any broad view of that term when it comes to criminal norms of general application.

35. A ***sixth*** justification for *Cain v Doyle* is a prudential principle, premised on federal comity. As Gibbs ACJ put it in *Bradken*,[57] it "seems only prudent to require that laws of the [Commonwealth] Parliament should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so." The force of this justification must be reconciled with *Jacobsen v Rogers*, where the majority held that, once it can be seen that a polity "intends to bind its *own* executive government, there is no reason to suppose that it did not intend to bind the executive governments of [other polities]".[58] Further, this justification cannot support a rigid rule, which overrides more reliable indicators of objective intention.

(E) Cain v Doyle should be reopened, and overturned

36. For the following reasons, *Cain v Doyle* should be reopened and overturned.

37. ***First***, none of the putative justifications for *Cain v Doyle* can sustain its application in modern conditions as a rigid rule: see section **D** above. It is a relic of outdated constitutional theories, without contemporary justification in support of its rigidity.

38. ***Second***, *Cain v Doyle* as presently formulated distracts from the search for objective intention. It deprioritises analysis of the text, context and purpose in favour of *a priori* assumptions about what the legislature can be taken to intend based upon what it has typically done in the past.[59] *Cain v Doyle* itself illustrates this. The offence created by s 18 of the *Re-establishment and Employment Act 1945* (Cth) applied only to an "employer". Section 10 in terms provided that "employer" includes "the Crown (whether in right of the Commonwealth or of a State)". The minority judges would have given s 18 its "plain and ordinary meaning", and the definitions their "plain literal and grammatical meaning".[60] The minority's construction would have furthered the object of

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57 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 123 (Gibbs ACJ).
58 *Jacobsen v Rogers* (1995) 182 CLR 572, 591 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) (our emphasis).
59 Cf., *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [26] (French CJ and Hayne J).
60 *Cain v Doyle* (1946) 72 CLR 409, 421 (Starke J) and 432 (Williams J).

the legislation.[61] Of *Cain v Doyle* it may also be said that: "the majority's affection for plain language seems to end where its devotion to sovereign immunity begins."[62]

39. Section 62A of the *Interpretation Act 1978* (NT) adopts the "general systemic principle"[63] that a court is to prefer a construction which best promotes the purpose or object underlying the Act to one which does not. *Cain v Doyle* sits ill at ease with this principle. Purpose is something that generally "resides in" the text and structure of the legislation,[64] rather than something which is to be inferred by judges from what the judiciary has regarded over time as common expectation.

40. ***Third***, the rule in *Cain v Doyle* undermines equality before the law. The *Constitution* is "framed upon an assumption of the rule of law."[65] The "irreducible minimum" of that concept is now understood to be "that the Government should be under law, that the law should apply to and be observed by the Government and its agencies, those given power in the community, just as it applies to the ordinary citizen."[66] As such, it is "elementary" that every officer of the Commonwealth is "bound to observe the laws of the land",[67] and there is no power to dispense from compliance with the criminal law.[68] *Any* application of the rule that the Crown is not bound by a statute, especially criminal laws of general application, undermines "the general consideration of equality before the law".[69] In the specific context of statutory corporations, this Court has said that:

> "All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have

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61 E.g., *Cain v Doyle* (1946) 72 CLR 409, 432 (Williams J): "There is no scintilla of indication of any intention in the Act that the Crown should be … not liable to the express statutory remedies for breach."

62 *United States v Dalm*, 494 US 596, 622 (1990) (Brennan, Stevens and Marshall JJ).

63 In relation to the analogous s 15AA of the *Acts Interpretation Act 1901* (Cth), see *Thiess v Collector of Customs* (2014) 250 CLR 664, [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); and generally *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, [89] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ).

64 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44]-[45] (French CJ, Gummow, Hayne, Kiefel and Bell JJ); *Acts Interpretation Act 1901* (Cth), s 15AA; *Interpretation Act 1978* (NT), s 62A.

65 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

66 *MZAPC v MIBP* (2021) 273 CLR 506, [91] (Gordon and Steward JJ).

67 *A v Hayden* (1984) 156 CLR 532, 562 (Murphy J); approved *Henderson's Case* (1997) 190 CLR 410, 444 (Dawson, Toohey and Gaudron JJ), see also 427 (Brennan CJ).

68 *A v Hayden* (1984) 156 CLR 532, 580ff (Brennan J); *Ridgeway v The Queen* (1995) 184 CLR 19, 29ff (Mason CJ, Deane and Dawson JJ), 54 (Brennan J), 59 (Toohey J), 73 (Gaudron J), 81 (McHugh J).

69 *Tomaras* (2018) 265 CLR 434, [7] (Kiefel CJ and Keane J).

> the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention."[70]

This principle has been repeatedly endorsed.[71] It is incompatible with *Cain v Doyle*.

41. ***Fourth***, *Cain v Doyle* has been outpaced by the growing involvement of government in ordinary life. This Court has recognised the doctrinal significance (particularly in the context of statutory presumptions) of the fact that the activities of "the Crown" in modern times extend to "multifarious functions";[72] indeed, "into almost all aspects of commercial, industrial and developmental endeavour".[73] This was central to the reasoning in *Bropho*.[74] The more government engages in activities once considered exclusively private, "the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject."[75]

42. ***Fifth***, the operation of *Cain v Doyle* detracts from government accountability and engenders an unprofessional atmosphere in government, by endorsing a lower standard of conduct for government than for the private sector.

43. ***Sixth***, *Cain v Doyle* lacks internal coherence. It is clear that "servants and agents" do not have the benefit of *Cain v Doyle*.[76] According to the Full Court, this means only that natural persons associated with the executive government have no presumption against criminal liability: **J [69] fn 115; CAB 79 [69] fn 115**. If that is the correct analysis, it is incoherent. There is no defensible basis for a differential application upon artificial persons, e.g., statutory corporations, in whose name the criminal conduct was carried out.

44. ***Sixth,*** the rule in *Cain v Doyle* sits awkwardly with the growth in modern times of statutory "public welfare offences",[77] which are different from the morally stigmatised

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70 ***Townsville Hospital Board*** *v Townsville City Council* (1982) 149 CLR 282, 292 (Gibbs CJ, Murphy, Wilson and Brennan JJ agreeing).

71 *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, [15] (Gleeson CJ, Gaudron, McHugh and Hayne JJ); *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, [8] (Gleeson CJ), [26] (McHugh, Gummow and Heydon JJ), [65] (Hayne J), [79] (Callinan J); *Communications, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, [54] (Gageler J). See also *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 662 (the Court); *State Electricity Commission of Victoria v City of South Melbourne* (1968) 118 CLR 504, 510 (Barwick CJ, McTiernan, Taylor and Menzies JJ, Owen J agreeing).

72 *Jacobsen v Rogers* (1995) 182 CLR 572, 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

73 *Bropho* (1990) 173 CLR 1, 16-7, 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

74 Ibid, 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

75 *R v Eldorado Nuclear Limited* (1983) 4 DLR (4th) 193, 200 (Dickson J; Laskin CJC and Ritchie J concurring); see also *Quebec (Attorney General) v Canada* [2011] 3 SCR 635, 643 [15] (the Court).

76 *Jacobsen v Rogers* (1995) 182 CLR 572, 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

77 See e.g., Friedmann, "Public Welfare Offences, Statutory Duties, and the Legal status of the Crown" (1950) 13 *Modern Law Review* 24, 27; Barrett, "Prosecuting the Crown" (2002) 4 *UNDALR* 39, 40.

common law crimes (from larceny to murder) necessarily requiring a *mens rea*. It would not now be regarded as "inherently unlikely" that the Commonwealth, Australia's largest employer, should escape penal sanctions for breach of workplace health and safety laws, for example. Nor should it be regarded as "inherently unlikely" that the Territory Legislative Assembly should intend to protect Territory Aboriginal sacred sites from all persons carrying out work, including those associated with other polities.

45. As to the criteria justifying departure from earlier decisions,[78] *Cain v Doyle* does not rest upon a principle carefully worked out in a significant succession of cases. It has been referred to (albeit without disapproval) in only a handful of subsequent decisions of this Court,[79] which decisions expose uncertainty: **(a)** as to whether *Cain v Doyle* is an aspect of a single presumption, as contemplated in *Bropho*, or is instead a "different presumption";[80] and **(b)** as to its application beyond "the Commonwealth as a body politic"[81] to other aspects of the executive. There is no evidence that *Cain v Doyle* has been independently acted on in a manner that militates against reconsideration. The legislative history of the EPBC Act (discussed at [54] below) suggests that the legislature regards *Cain v Doyle* as limited to the "Crown itself".

46. ***Restatement:*** In place of *Cain v Doyle*, this Court should affirm that the ascertainment of intent to apply criminal norms to government should follow the same rule as civil norms: the ultimate question must be whether <u>all</u> the circumstances indicate that the relevant offence provision should bind the Crown. The "circumstances" include (but are not limited to[82]) "the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of

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78 See, e.g., *John v Federal Commissioner of Taxation* (1989) 166 CLR 416 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

79 *Bropho* (1990) 171 CLR 1, 23, 26; *SASB* (1996) 189 CLR 253, 270, 294; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, [22]; *Henderson's Case* (1997) 190 CLR 410 at 427,472; *Wurridjal v Commonwealth* (2009) 237 CLR 309, [164]-[165].

80 Compare *Bropho* (1990) 171 CLR 1, 26 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); and *SASB* (1996) 189 CLR 253, 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

81 See *Wurridjal v Commonwealth* (2009) 237 CLR 309, [164]-[165] (Gummow and Hayne JJ). In *SASB*, this Court concluded that the criminal offence in s 39(1a) of the Stamp Act would not have applied to the Board *because* it was the State: (1996) 189 CLR 253, 269-270 (Brennan CJ, Dawson, Toohey and Gaudron JJ) and 294 (McHugh and Gummow JJ). But the issue does not seem to have been argued – it having been conceded that the criminal offence "must be read down": 262 (*arguendo*). This conclusion seems to have been doubted (or at least was not expressly endorsed) in *X v APRA* (2007) 226 CLR 630, [14] fn 15 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

82 *Tomaras* (2018) 265 CLR 434, [52] (Gordon J).

the Executive Government which would be affected if the Crown is bound".[83] The Court should abolish the rigid rule that the "clearest expression" of intent is required. Alternatively, it should limit that rigid rule to the polity itself. The appeal should be allowed because the Sacred Sites Act does evince an objective intention to apply criminal norms to all natural persons and bodies corporate, whether associated with executive government or not: section **B** above.

(F) Different Polities in the Federation

47. It is worth emphasising separately that the Full Court erred in concluding that the *Cain v Doyle* rule operates with greater force ("*a fortiori*") to protect another polity: **J [25]; CAB 45-46 [25]; J [70]-[71]; CAB 79-80 [70]-[71]**. While in a federal system, "you do not expect to find either government legislating for the other"[84], that justifies no more than that both *Bropho* and (to the extent it remains good law) *Cain v Doyle* should each apply for the benefit of the enacting polity as well as for other polities in the federation.[85] As this Court held in *Jacobsen,* there is no reason to attribute the presumptions *greater* force as between two polities,[86] and none of the authorities cited by the Full Court at **J [26]; CAB 46 [26]** support that proposition.

(G) Commonwealth Statutory Corporations

48. ***No Cain v Doyle presumption:*** This appeal could be disposed of on the narrower basis that the Full Court erred in applying *Cain v Doyle* for the benefit of the DNP as a Commonwealth statutory corporation. The only justifications for *Cain v Doyle* having any contemporary significance (see [34]-[35] above) provide no reason to extend its protection, beyond the body politic, to a statutory corporation which the Parliament did not see fit expressly to endow with immunity from Territory law.

49. In creating the DNP as a legal person, and endowing it with functions and powers which allow it to move within the general system of State and Territory laws, it was open to the Commonwealth Parliament (by force of ss 109 and 122 of the *Constitution*) to provide the corporation with an immunity from State and Territory criminal laws. This could be

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83 *Bropho* (1990) 171 CLR 1, 28 (Brennan J); *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, [42] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

84 *In re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of fTaxation* (1947) 74 CLR 508, 529 (Dixon J).

85 As to *Cain v Doyle*, see *Telstra* (1999) 197 CLR 61, [22] (the Court). As to *Bropho*, see *Jacobsen* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

86 *Jacobsen v Rogers* (1995) 182 CLR 572, 591 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

done by "*express* provision",[87] by providing (for example) that the corporation is not subject to any liability to which the Commonwealth was not subject,[88] or that it is a statutory body "representing the Crown"[89] (though the efficacy of the latter formulation is now open to doubt[90]). Express provision is generally necessary to ensure that there can be appropriate democratic scrutiny – e.g., as to *why* it should be considered appropriate to allow Commonwealth persons to desecrate Aboriginal sacred sites with impunity.[91]

50. The search for legislative intention is more particular, and more stringent, than asking "generically (and loosely)"[92] whether the entity was intended to have the status of the executive government: cf., **J [25]; CAB 45-46 [25]; J [39(b)]; CAB 55 [39(b)]; J [42]-[43]; CAB 57-58 [42]-[43]**. The latter formulation overlooks that the immunities and privileges of Commonwealth are an aspect of the *executive* power conferred by s 61 of the *Constitution*,[93] whereas Commonwealth statutory corporations exercise *statutory* power.[94] They are <u>not</u> part of the Executive Government of the Commonwealth,[95] are <u>not</u> departments of state created by the Governor-General in Council under s 64 of the *Constitution*, and their finances can (like the DNP's) stand apart from those of the Executive Government controlled by ss 81 and 83.[96]

51. ***The relevant activities.*** A further, narrower path to success is that, even if statutory corporations such as the DNP could receive any protection by *Cain v Doyle*, the extent of protection must be assessed on a case-by-case basis depending upon the activities in suit. A statutory corporation performs diverse functions and the intention may be for it to have the benefit of a privilege or immunity for some purposes and not for others.[97]

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87 *Townsville Hospital Board* (1982) 149 CLR 282, 292 (Gibbs CJ, Murphy, Wilson and Brennan JJ agreeing); *SGH Ltd* (2002) 210 CLR 51, [15] (Gleeson CJ, Gaudron, McHugh and Hayne JJ); *McNamara* (2005) 221 CLR 646, [8] (Gleeson CJ), [26] (McHugh, Gummow and Heydon JJ), [65] (Hayne J), [79] (Callinan J).

88 *Bolwell v Australian Telecommunications Commission* (1982) 61 FLR 154, 157 (Smithers J) and *Telstra* (1999) 197 CLR 1, [8] (the Court).

89 *SASB* (1996) 189 CLR 253, 280 (McHugh and Gummow JJ).

90 *McNamara* (2005) 221 CLR 646, [44] (McHugh, Gummow and Heydon JJ).

91 D Barnett, 'Statutory Corporations and "The Crown"' 28(1) *UNSWLJ* 186, 190.

92 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 393 (Kitto J).

93 *Henderson's Case* (1997) 190 CLR 410, 464 (Gummow J).

94 *Telstra* (1999) 197 CLR 1, [15] (the Court).

95 *Henderson's Case* (1997) 190 CLR 410, 469 (Gummow J). See also *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287, [7] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Airlines Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136, [14] (Gleeson CJ, Gummow and Hayne JJ); *Telstra* (1999) 197 CLR 61, [15] (the Court).

96 EPBC Act, ss 514S and 514R. See *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, [373] (Gummow J).

97 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 350 (Stephen J); *Townsville Hospitals Board* (1982) 149 CLR 282, 288 (Gibbs CJ; Murphy, Wilson and Brennan JJ agreeing).

Consistently with that, in *Townsville Hospitals Board*, Gibbs CJ said it "would not be profitable to discuss the provisions of the Act in detail, since we are particularly concerned *only with the functions of the Board, in erecting buildings*…".[98] The Full Court erred by considering the question too broadly – analysing functions which the DNP might otherwise perform, rather than focusing on the activities in suit: **J [50]-[69]; CAB 64-79 [50]-[69]**. In this case, the relevant function was to erect structures and carry out works on land leased for its joint management with Aboriginal people.[99]

52. ***Unhelpful analogies:*** It was a further error for the Full Court to apply principles derived from ss 75 and 114 of the *Constitution* to the present question: cf., **J [44]-[49]; CAB 58-64 [44]-[49]**. A body may be the "State" or "Commonwealth" for the purposes of ss 75 or 114 even though it does not enjoy the privileges and immunities of the Crown.[100] The "State" or the "Commonwealth" in the context of ss 75 and 114 are given a broad construction to avoid constitutional protections being undermined by a State or the Commonwealth choosing to clothe itself in some corporate form.[101] Section 75(iii) preserves the rule of law by maximising this Court's jurisdiction over "the political organisation called into existence under the name of the Commonwealth".[102] While incorporation is a "neutral factor" in the application of s 75(iii), and the question turns on whether the entity performs a public function and is subject to public control,[103] rule of law considerations point in the opposite direction in this context: see [40], [49]-[50] above.

(H) The Intention of the EPBC Act

53. Lastly, if the correct approach to the construction of Territory legislation is to *start* with the Commonwealth law, this Court should hold that the EPBC Act does not disclose an

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98 *Townsville Hospitals Board* (1982) 149 CLR 282, 289 (Gibbs CJ; Murphy, Wilson and Brennan JJ agreeing). See, similarly, *The Paul Dainty Corporation Pty Ltd v The National Tennis Centre Trust* (1990) 22 FCR 495, [68] (Woodward, Northrop and Sheppard JJ) ("the [Trust], in its provision of a commercial service in the form of the Bass ticketing service, is not operating under that shield").

99 EPBC Act, ss 514B(1)(a) and 514C(2)(b)-(c).

100 *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219, 230-231 (the Court); *SASB* (1996) 189 CLR 253, 282-283 (McHugh and Gummow JJ); *SGH Ltd* (2002) 210 CLR 51, [15], [45] (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

101 *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60, [30] (Allsop P, Hodgson JA and Sackville AJA agreeing).

102 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J).

103 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [39]-[40] (Gleeson CJ, Gaudron and Gummow JJ, Hayne and Callinan JJ agreeing), [126] (McHugh J).

intention that the DNP should enjoy the benefit of *Cain v Doyle* either generally or when undertaking the function in question. The Full Court erred in concluding to the contrary.

54. Unlike other Commonwealth legislation,[104] the EPBC Act did not use the "time-honoured language"[105] to confer the immunities and privileges of the Commonwealth. Instead, the text and legislative history of the EPBC Act strengthen rather than rebut the inference that the DNP was intended to be bound by State and Territory laws. In the Bill[106] as first introduced, cl 4(1) provided that the Act bound the Crown in each of its capacities, but cl 4(2) stated the Act "does not make the Crown liable to be prosecuted for an offence." In the Senate, the Government moved to remove cl 4(2). After referring to the "long tradition of Crown immunity from criminal liability", the Supplementary Explanatory Memorandum said at [4] that the purpose of the amendment was to "avoid any appearance that this immunity extended to Commonwealth employees, servants and agents who breach offence provisions of the EPBC Bill". Critically, it then said at [5]:

> "In removing subclause 4(2), it is not the intention to reverse the long-held policy that the Crown itself, as opposed to its emanations in the form of officials, servants and agents, and corporate entities, should not be subject to criminal prosecution." (emphasis added)

55. Consistently with that, the EPBC Act creates offences which attach generically to "persons" [107] and which impose liability on the DNP (but not the Commonwealth). For example, s 354(1) makes it an offence for a "person" to undertake certain activities on Commonwealth reserves except in accordance with a plan of management. Section 354(2) then provides special defences which are peculiar to the DNP (see also ss 354A(1) and (10)), showing that the DNP is otherwise exposed. Further, the EPBC Act expressly immunises some entities (but not the DNP) from prosecution or the effect of laws, which would be redundant if Parliament did not otherwise intend that the DNP be bound (e.g., s 498A). The DNP was plainly not intended to possess the same presumptive immunity from liability enjoyed by the Commonwealth: cf., **J [66]; CAB 76-77 [66]**.

56. Finally, the ALRA contemplates the application of Territory sacred sites laws to the DNP, including on Aboriginal land, save where that would be operationally inconsistent with

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104 E.g., *Australian Information Commissioner Act 2010* (Cth), s 12.
105 *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 661 (the Court).
106 *Environment Protection and Biodiversity Conservation Bill 1998* (Cth).
107 By reason of s 2C(1) of the *Acts Interpretation Act 1901* (Cth), a "person" includes a body corporate.

the EPBC Act: ss 73(1)(a) and 74(1). Any immunity from prosecution flows from the supremacy of the Commonwealth laws which provide for the DNP's powers and functions, not from an outmoded and unnecessary *Cain v Doyle* rule.

Part VII: Orders sought

57. The Appellant seeks the following orders: **(1)** The appeal is allowed. **(2)** Set aside Order 1 of the orders of the Full Court and, in its place, order that the question of law referred to the Full Court is answered as follows: "In the circumstances the subject of the charge, the offence and penalty prescribed by s 34(1) of the Sacred Sites Act do apply to the DNP as a matter of statutory construction".

58. There should be no orders as to the costs of the appeal, irrespective of the outcome, as was agreed in the Full Court and in relation to the costs of the special leave application.

Part VIII: Estimate of time required

59. The Appellant estimates that it will need 2 ½ hours for oral argument.

Dated: 12 July 2023

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY OF AUSTRALIA

BETWEEN:

Chief Executive officer,
Aboriginal Areas Protection Authority
Appellant

- and -

Director of National Parks (ABN 13 051 694 963)
First Respondent

Attorney-General of the Commonwealth
Second Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No. 1 of 2019*, the Appellant sets out below a list of the Constitutional provisions, statutes, and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	ss 61, 64, 75, 81, 83, 109, 114, 122
Statutory provisions			

2.	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)	Compilation prepared 13 March 2019	ss 3(1), 73(1)(a), 74(1)
3.	*Acts Interpretation Act 1901* (Cth)	Current	2C(1), 15AA
4.	*Criminal Code Act 1983* (NT)	As in force at 6 December 2018	Sch 1, Pt IIAA, Div 5 (in particular, s 43BK)
5.	*Crown Proceedings Act 1993* (NT)	As in force at 18 June 2009	s 5(2)
6.	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)	Compilation prepared 29 October 2018	Pt 15, Div 4 (in particular, ss 354(1), 354(2), 354A(1), 354A(10), 362(1), 370), ss 498A, 514B(1)(a), 514C(2)(a)-(c), 514E(1)(a), 514E(1)(c), 514R, 514S
7.	*Environment Protection and Biodiversity Conservation Bill 1998* (Cth)	As introduced on 12 November 1998	cls 4(1), 4(2)
8.	*Fines and Penalties (Recovery) Act 2001* (NT)	As in force at 1 May 2016	s 117(1)
9.	*Interpretation Act 1978* (NT)	As in force at 18 February 2019	ss 17, 18A(1), 24AA(1), 34(1), 35(1)-(2), 38B, 55, 62A
10.	*Judiciary Act 1903* (Cth)	Compilation prepared 25 August 2018	ss 2, 67B, 78B
11.	*Local Court (Criminal Procedure) Act 1928* (NT)	As in force at 20 June 2018	Pt IV, Div 2

12.	*Northern Territory Aboriginal Sacred Sites Act 1987* (NT)	Current	Preamble, Pts III-IV (in particular, ss 19B, 19F, 19G, 19L, 25, 27(1), 29, 33, 34(1), 35, 37, 38, 39), ss 4, 5(2), 5(5), 10(d), 48
13.	*Northern Territory Aboriginal Sacred Sites Amendment Act 2005* (NT)	As made	ss 4
14.	*Northern Territory Aboriginal Sacred Sites Amendment Bill 2005* (NT)	As introduced on 20 October 2005	cls 4(2)-(4)
15.	*Northern Territory (Self-Government) Act 1978* (Cth)	Compilation prepared 1 July 2014	ss 4, 6
16.	*Re-establishment and Employment Act 1945* (Cth)	As amended by the *Commonwealth Public Service Act 1945*	ss 10, 18