



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

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

OUTLINE OF ORAL SUBMISSIONS OF THE SECOND RESPONDENT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The offence and penalty in s 34 do not apply to bodies corporate which have the same legal status as the Commonwealth body politic (RS [8]-[23])

2. The norm in s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1987* (NT) (Vol 2, Tab 8) binds the Commonwealth and its instrumentalities (CAB 87 [81]), but the offence and penalty do not: *Cain v Doyle* (1946) 72 CLR 409 at 425 (Vol 4, Tab 24); *SASB* (1996) 189 CLR 253 at 270 (Vol 6, Tab 36). Section 4 of the Sacred Sites Act provides a complete answer to whether offences in that Act were intended to apply to Commonwealth statutory corporations. Subsection 4(2) reveals a clear intention that offences bind the Territory Crown, but discloses no intention to bind the Crown in any other capacity. Subsection 4(3) is concerned only with natural persons but, even if “agents” included statutory corporations, it applies only to agents of the Territory Crown. Subsection 4(4)(b) concerns authorities or instrumentalities that generally will have separate legal personality. It recognises that, in the absence of a clear statement, offences will not apply to authorities or instrumentalities that have the same legal status as the Territory Crown, and it provides such a clear statement: cf AS [20].
3. The Northern Territory Aboriginal Sacred Sites Amendment Bill 2005 (as introduced) (Vol 2, Tab 10) would have extended the criminal liability provisions in s 4(2)-(4) to “the Crown in any of its capacities”, including the Commonwealth. But that version was rejected by the Legislative Assembly, and the current narrower version was enacted: Legislative Assembly, *Debates*, 20 October 2005 (Vol 9, Tab 56) and 1 December 2005 (Vol 9, Tab 57). That history confirms that s 4(2)-(4) do not establish “intra-mural” provisions for the prosecution of the Territory Government (cf AS [20]); instead, they reveal an intention to impose criminal liability only upon the Territory Crown.
4. *Cain v Doyle* (Vol 4, Tab 24) leads to the same result. Cases applying it establish that: *first*, the conclusion that an Act binds the Crown does not mean that criminal offences in that Act apply to the Crown; and *second*, general words in an Act that make offences binding on bodies corporate do not mean that those offences apply to bodies corporate that have the same legal status as a body politic: *SASB* at 264, 269-270, 277, 280, 294 (Vol 6, Tab 36); *Telstra* (1999) 197 CLR 61 at [15], [18]-[19], [21]-[23] (Vol 6, Tab 38).

The application to re-open *Cain v Doyle* should be refused (RS [24]-[27])

5. The Full Court’s conclusion is sustained by s 4 of the Sacred Sites Act, meaning it is unnecessary in this case to reach *Cain v Doyle*. Further, *Cain v Doyle* is a rebuttable interpretive presumption: its re-opening would not involve a re-evaluation of the substantive rights, liabilities or immunities of any person. In light of the “strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law”, those factors militate strongly against re-opening *Cain v Doyle*: *NZYQ* [2023] HCA 37 at [17]. In particular, *Cain v Doyle* has provided clarity and certainty for legislative drafters: *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Vol 9, Tab 52)*; *Drafting Direction No 1, 1998*. It has also been repeatedly endorsed and relied on by this Court, and is a working hypothesis upon which Parliaments should be assumed to have relied, with no case in the intervening 75 years doubting its correctness: RS [27] fn 28.

If re-opened, *Cain v Doyle* should be affirmed (RS [28]-[34])

6. *Cain v Doyle* has repeatedly been recognised as a rebuttable presumption, and not as a “rigid rule of law”, including by the Full Court: cf AS [26], [37]; **CAB 81 [72], 84-85 [78], 86 [80]**. It is consistent with the contemporary approach to statutory interpretation, which is replete with rules displaced only by “necessary implication”. As a rebuttable presumption, it poses no threat to “equality before the law”: cf AS [37], [40]-[44].
7. *Cain v Doyle* has particular and ongoing importance in the intergovernmental context. In a federation, one does “not expect to find either government legislating for the other”: *Uther* (1947) 74 CLR 508 at 529; *Mining Act Case* (1999) 196 CLR 392 at [32], [238] (**Vol 4, Tab 25**). Still less would one expect to find one government imposing criminal liability on another: *Henderson* (1997) 190 CLR 410 at 472 (**Vol 5, Tab 33**); *Jacobsen* (1995) 182 CLR 572 at 591, 602 (**Vol 4, Tab 29**).

A statutory corporation can enjoy the same legal status as its body politic (RS [35]-[41])

8. It is undisputed that the Commonwealth may validly create a statutory corporation that is not bound by any law which is not binding on the Commonwealth itself: AS [49].
9. Whether a statutory corporation is intended to have the same legal status as the Commonwealth requires consideration of a number of indicia, the most significant being: (i) whether the Executive Government controls the corporation; and (ii) whether it performs governmental functions for the Commonwealth: *SFIT* (1979) 145 CLR 330 at 339, 341-344, 347-348, 351, 354, 365, 371-372 (**Vol 6, Tab 37**). The relevance of *SFIT*

is not denied by *DCT v State Bank (NSW)* (1992) 174 CLR 219 at 230, 233 (**Vol 4, Tab 26**); *SGH* (2002) 210 CLR 51 at [15]-[16], [22] (**Vol 5, Tab 34**); cf Reply [12].

10. There is no requirement that the privileges and immunities of the body politic be conferred on a statutory corporation by “express provision”: *Townsville Hospitals Board* (1982) 149 CLR 282 at 288, 289, 291-293 (**Vol 6, Tab 39**); cf AS [49].

The Director has the same legal status as the Commonwealth (RS [42]-[54])

11. The Director was created as the vehicle by which the Commonwealth sought to carry out functions of the national government: *Newcrest* (1997) 190 CLR 513 at 562 (**Vol 5, Tab 31**). Its functions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) are intrinsically governmental, and encompass the full stewardship and management of Commonwealth reserves: s 514B-514C (**Vol 2, Tab 5**); **CAB 25 [12]**.

12. The Director is subject to immediate Ministerial control in the exercise of its functions: s 514D, 514G. The Director is appointed by the Governor-General, conditioned on Ministerial satisfaction of qualifications and experience: s 514F; **CAB 24 [11]**, **AGBFM 5-8**. The Director’s term and remuneration are fixed (ss 514H, 514J, 514P), but other employment conditions are under Executive control: ss 514K, 514M, 514Q.

13. The Director is funded by Departmental allocations of appropriated funds; self-generated income is subject to Ministerial approval: ss 356A, 514R-514W; **AGBFM 103, 195**. The Minister and Secretary may delegate their functions to the Director: s 515. The Director relies on Departmental staff: **AGBFM 220**; **CAB 25 [13]-[16]**.

14. Governmental control over the Director is not displaced by the requirement that the Director comply with a management plan, which is a legislative instrument approved by the Minister: ss 362-363, 365-367, 369-371. Liability for offences against s 354A of the EPBC Act does not indicate that the Director lacks the same legal status as the Commonwealth. It indicates that Parliament rebutted *Cain v Doyle* in a specific respect. The question whether a given corporation enjoys the presumption is different from whether the presumption has been displaced by a statute.

15. Focus on the factual nature of the activities in suit is misplaced, but in any event, the realignment of the walking track was a governmental function which only the Director could perform: **IBFM Vol 3, 210, 227, 246**; **AGBFM 227**.

Dated: 12 December 2023


Stephen Donaghue

Brendan Lim

Amanda Sapienza