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:

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DIRECTOR OF NATIONAL PARKS (ABN 13 051 694 963)
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issues asserted by the appellant (**AAPA**) in **AS [2]** do not necessarily arise. The offence and penalty prescribed by s 34(1) of the *Northern Territory Aboriginal* ***Sacred Sites Act*** *1989* (NT) apply to individuals and bodies corporate but, as AAPA accepts, do not apply to bodies politic (other than the Territory): **AS [16]**. The appeal therefore turns on whether the Director of National Parks (**DNP**), as a matter of Commonwealth legislative intention, is on the same footing as natural and other corporate persons or whether, instead, the DNP is intended to have the legal status of the Commonwealth body politic, not subject to criminal liabilities that do not apply to the Commonwealth itself. AAPA accepts that the Commonwealth Parliament *could* make provision to this effect: **AS [49]**. On one view, the only room left for debate is whether the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) does so.[1]

3. AAPA wrongly assumes that a statutory corporation is never akin to the body politic itself but instead always akin to officers and employees with natural personality: **AS [16], [20]**. Depending on the legislative intention, however, a corporation might have either character. In each case there is "a question", to be answered by statutory interpretation, whether a statutory corporation is bound by legislation that would not bind the body politic itself.[2] The answer to that question depends particularly on examination of the extent of executive control over the corporation, and upon whether the corporation performs governmental functions.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. Sufficient notice has been given under s 78B of the *Judiciary Act 1903* (Cth): **CAB 108-112**.

PART IV MATERIAL FACTS

5. The second respondent agrees with the substance of the material facts at **AS [5]**, **[7]-[10]**, but not with all of the references. **AS [6]** does not accurately state the DNP's functions under the

[1] The main provisions are: ss 1-10, Pt 15 Div 4, Pt 19 Div 5 and s 515 as in force in April 2019.

[2] *X v* ***APRA*** (2007) 226 CLR 630 at [14]. The submission of the Aboriginal parties at **NLC [25]**, that this paragraph "questioned" the possibility of such a corporation, is a misreading of the reasons.

EPBC Act. Some additional facts are referenced below (see also Second Respondent's Book of Further Materials (**AGFM**)).

PART V ARGUMENT

A. SUMMARY

6. **Part B – *Construction of Sacred Sites Act***: The offence and penalty in s 34 of the Sacred Sites Act do not apply to the Commonwealth body politic. The application of s 34 to "bodies corporate" does not include corporate authorities or instrumentalities which, as a matter of Commonwealth law, have the same legal status as the Commonwealth body politic. This conclusion is reached independently of the *Cain v Doyle* presumption because the effect of s 4 of the Sacred Sites Act is clear. The application to re-open *Cain v Doyle* should be refused because overruling *Cain v Doyle* could not make a difference to the disposition of the appeal, and because the criteria for re-opening are not met in any event. Alternatively, *Cain v Doyle* should be affirmed. Further and alternatively, if *Cain v Doyle* is to be overruled, the Court should nonetheless make clear that it is appropriate for courts to have regard to the overruled presumption when construing statutes that were enacted prior to the overruling.

7. **Part C – *Construction of EPBC Act***: The Commonwealth Parliament intended the DNP to have the same legal status as the Commonwealth, in the sense that it is not to be subject to any criminal liability under another polity's laws to which the Commonwealth itself is not also subject. The DNP is the alter ego of the Commonwealth and the vehicle through which the Commonwealth itself carries out the governmental function of managing national parks. The re-alignment of the walking track at Gunlom involved the performance of regulatory functions for the management and stewardship of Kakadu National Park.

B. THE SACRED SITES ACT DOES NOT PURPORT TO IMPOSE CRIMINAL LIABILITY UPON THE COMMONWEALTH OR ITS AUTHORITIES

8. Section 34(1) of the Sacred Sites Act provides that "[a] person" shall not carry out work on, or use, a sacred site. It specifies penalties only for natural persons and bodies corporate, and not for bodies politic. This is consistent with s 38B of the ***Interpretation Act*** 1978 (NT), which provides that "[a] provision of an Act relating to offences shall be read as referring to bodies corporate as well as to individuals". The general rule that "person" includes a body

politic is displaced: cf s 24AA(1) of the Interpretation Act. It is common ground that the language of s 34(1) of the Sacred Sites Act, read conformably with s 38B of the Interpretation Act, does not extend to the Commonwealth body politic: **AS [16]**.

9. AAPA's essential submission is that, while the Sacred Sites Act clearly does not seek to expose the Commonwealth body politic to penalty, it conceives of the body politic only in the narrowest sense.[3] That submission does not properly grapple with the long-recognised possibility that statutory corporations are not necessarily created on an equal footing with other bodies corporate, but instead might be created with the same legal status as the body politic, in which case they are not subject to liabilities to which the body politic itself would not be subject. This was once articulated in the language of the "shield of the Crown",[4] but is more accurately a question of identifying "government instrumentalities and authorities intended to have the same legal status as the executive government".[5]

10. Accordingly, the first question in this appeal is whether the Sacred Sites Act should be interpreted as applying to such bodies corporate, even though it does not apply to bodies politic themselves (other than the Territory). The answer to that question appears from s 4 of the Sacred Sites Act. *Cain v Doyle*, separately from s 4 and ultimately unnecessarily, provides the same answer. Each route to this conclusion is addressed in turn.

Section 4 of the Sacred Sites Act

11. Section 4(1) of the Sacred Sites Act provides, in language common to many Acts in Australia, that the Act "binds the Territory Crown and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities". Section 4(2) provides that the "Territory Crown, in any of its capacities", can be liable for criminal offences. Section 4(3) makes clear that the liability of individuals acting for the Crown is unaffected. By s 4(4), references to the "Territory Crown" in s 4 are references to that Crown in its broadest sense, including agencies, authorities and instrumentalities of the Territory Crown.

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[3] *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [75] (Kiefel CJ, Bell, Gageler and Keane JJ), [126] (Nettle J), [213] (Edelman J) cited in **AS [16]**.
[4] As explained in *Deputy Commissioner of Taxation v **State Bank (NSW)*** (1992) 174 CLR 219 at 230-231 (the Court), applied in *Queanbeyan City Council v **ACTEW** Corporation Ltd* (2011) 244 CLR 530 at [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[5] *Commonwealth v WA (**Mining Act Case**)* (1999) 196 CLR 392 at [33] (Gleeson CJ and Gaudron J).

12. Contrary to **AS [20]**, the reference to "agent" in s 4(3), being collocated with reference to officers and employees, does not include statutory corporations. The persons referred to in the subsection are natural persons. This reflects the usage in *Bropho*, which repeatedly referred to natural persons including "agents" in contrast to statutory authorities, and which must have been well-known to the drafters of s 4 in 2005.[6] Also contrary to **AS [20]**, the reference in s 4(4)(b) to authorities and instrumentalities is not to "parts of the Territory Government that are unlikely to have independent legal personality". Rather, "Agencies", which include government departments without legal personality, are referred to separately in s 4(4)(a). Authorities and instrumentalities in s 4(4)(b) include *statutory* bodies that *do* have legal personality or, at least, are outside the narrowest conception of the body politic on which AAPA relies. So much is illustrated by AAPA itself, which is an "Authority", notwithstanding that it is established as a body corporate by s 5 of the Sacred Sites Act.

13. The conception of the Crown which underpins the Sacred Sites Act is thus a broad one. It is not limited to the narrowest conception of the body politic, but expressly includes authorities and instrumentalities and thus instantiates a broader conception of the Crown; one which invokes "conceptions of ordinary life"[7] capable of encompassing statutory authorities and instrumentalities. The wide coverage of s 4(4) indicates that the conception of the Territory body politic to which criminal liability was extended includes statutory corporations associated with the Territory body politic. The reason that clarity was necessary, despite s 34(1) applying in terms to "bodies corporate", is that the imposition of criminal liability on "bodies corporate" generally is not sufficient to reach the special category of statutory corporations having the status of the body politic. The extension of criminal liability to those bodies is the work done by ss 4(2) and 4(4). Critically, however, those sections do that work *only* for the Territory Crown. The Crown in right of the Commonwealth, the States, and other Territories, including corporate authorities or instrumentalities having the legal status of the Crown, are thereby deliberately left beyond the reach of the criminal sanctions of the Sacred Sites Act (**J [78]**, **[80]**, **CAB 84-87**). Put differently, the affirmative inclusion of the Territory Crown supports a negative implication to the effect that all other manifestations of the Crown

[6] ***Bropho*** *v Western Australia* (1990) 171 CLR 1, especially at 14, 15, 16, 19, 20, 21, 22, 23-24 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) distinguishing instrumentalities from agents.
[7] *State Bank (NSW)* (1992) 174 CLR 219 at 230 (the Court); see also *ACTEW* (2011) 244 CLR 530 at [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

are excluded. That is unsurprising, for generally one polity within a federation would not be expected to impose criminal liability on another.

14. The legislative history of s 4 puts the negative implication beyond doubt. Section 4, as first enacted, consisted of a single statement that "[t]his Act binds the Crown not only in right of the Territory but, to the extent that the legislative power of the Legislative Assembly so permits, in all its other capacities". A concern arose that government agencies and authorities in the Territory undertook a significant proportion of works, allegedly damaging sites in doing so, and that the lack of clarity in the liability of the Crown to be prosecuted led to some prosecutions not being pursued despite sufficient evidence.[8] The substitution of s 4 through

10 the *Northern Territory Aboriginal* ***Sacred Sites Amendment Bill*** was seen as providing "an appropriate capacity to prosecute the Crown by clarifying" the extent to which the Crown will be liable and to whom the term "the Crown" applies.[9]

15. Clause 4 of that Bill, as first introduced, proposed a clause materially identical to the current s 4 *except* that s 4(2) referred to the Crown in any of its capacities, rather than to the Territory Crown in any of its capacities. Section 4(4), in that initial version of the Bill, still defined "Crown" to extend to Agencies, authorities and instrumentalities. This version of the Bill did not pass the Legislative Assembly. It appears that the Solicitor-General of the Northern Territory gave advice and clarified "the situation between the two governments".[10] The second government referred to was the Commonwealth, as was made clear in a later address

20 referring to the government "invit[ing] the defeat of section 4, that part that applies to the Commonwealth".[11] The original s 4 was duly defeated, and s 4 was then enacted in its current form, limiting ss 4(2)-(4) to the "Territory Crown".

16. This legislative history demonstrates that AAPA's submission that ss 4(2)-(4) are "intra-mural" provisions, concerned merely with the process for prosecuting different parts of the Territory Government, cannot be sustained: cf **AS [20]**. Sections 4(2)-(4), as originally proposed, were in identical language and yet could not possibly have been intended to

[8] Legislative Assembly, Debates, Thursday 20 October 2005, 1062.
[9] Legislative Assembly, Debates, Thursday 20 October 2005, 1062. See also **J [76]**, **CAB 83** (concerning the Explanatory Memorandum to the Sacred Sites Amendment Bill, likewise referring to adding clarity).
[10] Legislative Assembly, Debates, Thursday 1 December 2005, 1349.
[11] Legislative Assembly, Debates, Thursday 1 December 2005, 1351.

provide an "intra-mural" "process" for prosecuting different parts of *other* governments (cf **AS [24]**).

17. Sub-sections 4(2)-(4) were enacted to "clarify" the extent to which the Sacred Sites Act imposes criminal liability on governments. The Legislative Assembly defeated a version of s 4 that would have purported to extend liability to the Commonwealth and its authorities and instrumentalities.[12] It then confined s 4 to "the Territory Crown", making plain that the Sacred Sites Act did not purport to make the Commonwealth (including its authorities and instrumentalities) liable to prosecution under the Act. The proposition (**AS [24]**) that s 4(1) was "objectively intended" to apply criminal norms to persons "irrespective of whether they
10 are associated with any polity, whether the Territory, Commonwealth or otherwise" is untenable. It denies the very concern that prompted the defeat of the original s 4 and its subsequent narrowing (ie to exclude from the offences the Commonwealth *and* its authorities and instrumentalities, which s 4(4) included in its original form but not the form enacted).

18. The Legislative Assembly did precisely what the *Cain v Doyle* presumption requires: it "adverted to the matter and … advisedly resolved upon so important and serious a course".[13] So, even if the *Cain v Doyle* presumption is disregarded, the legislative intention is clear.

19. AAPA's contrary construction of s 4 has the arbitrary consequence that the Legislative Assembly is imputed with the intention to impose criminal liability on *all* corporate instrumentalities of the Commonwealth, but *none* of its non-corporate emanations. The
20 preferable construction is that the Assembly decided not to impose criminal liability on the Commonwealth, including authorities and instrumentalities which, as a matter of Commonwealth law, are not subject to liabilities to which the Commonwealth is not subject.

20. Contrary to **AS [14]-[19]**, nothing in the legislative scheme points against that conclusion. That the Sacred Sites Act contains extensive criminal norms is not a reason to construe s 4(1) as binding the Commonwealth to those criminal norms (cf **AS [19]**). It is uncontroversial that, apart from the Territory by virtue of s 4, the criminal provisions do not apply to bodies politic (at least in the narrow sense) and do not prescribe any penalty for bodies politic.

[12] Legislative Assembly, Debates, Thursday 1 December 2005, 1352, read with 1351.
[13] *Cain v Doyle* (1946) 72 CLR 409 at 424 (Dixon J).

Section 4(1) would be distinctly nonsensical if it were read as binding the Crown to criminal provisions which, on their own terms, do not prescribe any penalty for the Crown.[14] Further, the Sacred Sites Act applies to a wide range of individuals and private corporations who enter, carry out work on, or use sacred sites,[15] and, indeed, to the Territory Crown. In those circumstances, the scheme for deterrence by criminal punishment does not depend on binding government instrumentalities other than those of the Territory (cf **AS [18]**).

21. Acceptance of the above submissions would not deprive s 4(1) of operation. For example, ss 44-47 concern the rights of landowners and access to sacred sites, which sensibly apply to governments. Similarly, the scheme for Authority Certificates engages obligations to consult with traditional custodians (see s 19F). Facilitating such consultation (including with government) is, of itself, consistent with the aim of the Sacred Sites Act to preserve and enhance Aboriginal cultural tradition. AAPA's submission that "the sole purpose of the authorisation is to provide an excuse for what would otherwise be an offence" and that "there is no civil obligation to … apply for an Authority Certificate" (**AS [18]**) may be doubted.

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The *Cain v Doyle* presumption

22. An alternative route to the same conclusion is *Cain v Doyle*, which recognised the "strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature".[16] That presumption has been considered to be a particular manifestation of the presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents,[17] in which the potential for criminal liability is a circumstance affecting the strength of the general presumption.[18] It has also been considered to be a distinct presumption "based upon the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty".[19] Nothing of

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[14] ***Telstra** Corporation Ltd v Worthing* (1999) 197 CLR 61 at [21]-[22] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) recognised that provisions like s 4(1) do not suffice to apply criminal liabilities to the Crown. See also ***AGU** v Commonwealth (No 2)* (2013) 86 NSWLR 348 at [29] (Basten JA).

[15] "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens": *United States v Hoar* (1821) 2 Mason 311 [26 Fed Cas 329 at 330] (Story J), quoted in ***Bradken** Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 122 (Gibbs ACJ).

[16] *Cain v Doyle* (1946) 72 CLR 409 at 424 (Dixon J).

[17] See, eg, *Bropho* (1990) 171 CLR 1 at 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[18] See, eg, *Bropho* (1990) 171 CLR 1 at 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Federal Commissioner of Taxation v **Tomaras*** (2018) 265 CLR 434 at [108] (Edelman J).

[19] *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 (***SASB***) at 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

substance turns on the precise taxonomy (cf **AS [45]**). Either way, the requirement for clarity on the part of a legislature that seeks to impose criminal liability on a government is not satisfied by general references to bodies corporate, especially if the legislation manifests an intention not to penalise the body politic itself.

23. The present case concerns an offence provision which, it is common ground, does not apply to bodies politic other than the Territory. The additional work that the *Cain v Doyle* presumption could do (if s 4 were not clear enough) is to point in favour of construing the offence and penalty as inapplicable to bodies corporate that have the same legal status as the bodies politic themselves. This is the modality in which *Cain v Doyle* was considered in
10 *SASB*.[20] A NSW statutory corporation was held to be bound by WA stamp duty legislation, but the Court explained that nevertheless, applying *Cain v Doyle*, criminal penalties in the WA legislation would not apply to the corporation if it were the Crown.[21] This conclusion was unrelated to the provision that the NSW corporation represented the Crown: that provision operated only for purposes of NSW legislation and was irrelevant to the applicability of the WA law (cf **AS [49]**).[22]

***Cain v Doyle* should not be re-opened or overruled**

24. AAPA applies to re-open *Cain v Doyle*. The practice of this Court is that "such a course is not lightly undertaken".[23] It certainly is not a course that the Court should take if it accepts the submission in the preceding section that the Full Court's conclusion is sustained on any
20 view of s 4 of the Sacred Sites Act (that is, with or without the additional weight of any interpretive presumption). That is because "in addition to the [*John* criteria] … there is the prudential consideration that this Court should not embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so".[24]

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[20] (1996) 189 CLR 253.
[21] (1996) 189 CLR 253 at 269-270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 293-294 (McHugh and Gummow JJ).
[22] (1996) 189 CLR 253 at 264 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 280, 289, 292 (McHugh and Gummow JJ).
[23] *John v FCT* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
[24] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [249] (Gummow and Hayne JJ), quoted with approval in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [37] (McHugh, Gummow and Hayne JJ). See also *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at [11] (Kiefel CJ, Keane, Nettle and Edelman JJ) and [49] (Bell, Gageler and Gordon JJ).

25. In any event, the relevant considerations weigh against re-opening. Indeed, none of the four *John* criteria are satisfied. Of those criteria, the third (whether the decision has led to no useful result or considerable inconvenience) and the fourth (whether the decision has been relied on subsequently) militate particularly strongly against re-opening.[25]

26. As to the third criterion, there is, and could be, no suggestion that the interpretive presumption in *Cain v Doyle* has led to no useful result or to inconvenience. The decision has provided clarity and certainty for legislative drafters who frame offence provisions. Detailed instructions on how to frame offence provisions having specific regard to *Cain v Doyle* are promulgated by the Attorney-General's Department to all Australian Government
10 departments,[26] and these instructions are relied on by the Office of Parliamentary Counsel.[27]

27. As to the fourth criterion, the decision has stood for more than 75 years, and has been endorsed many times by this Court.[28] There is every reason to think, and no reason to doubt, that for many decades all Australian Parliaments have relied upon the *Cain v Doyle* presumption when passing legislation that might be construed as imposing criminal liability on a body politic. Section 4 of the Sacred Sites Act is a clear example. The EPBC Act is another: the legislative history of s 4 (see further below at [50]) demonstrates that the Commonwealth Parliament considered particular wording to make express that the Act was not intended to make the Crown liable to prosecution, but then deleted that wording in reliance on the "long tradition of Crown immunity from criminal liability and a relevant case
20 law [that] supports that immunity and would require clear displacement of such a strong presumption against any intention to render the Crown criminally liable".

28. It is not surprising that some of the original rationales for an interpretive principle developed in 1946 would not be expressed in the same way today. In the context of a rebuttable interpretive presumption, however, the more important consideration is the drafting practice

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[25] As to the other criteria, numerous cases have applied *Cain v Doyle* or referred to it approvingly, and there is no line of authority advocating against the presumption recognised in that case (whether in the case itself, or since).
[26] *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* at [1.1], [2.4.3].
[27] *Drafting Direction No. 3.5 Criminal law and law enforcement*, Office of Parliamentary Counsel, 17 June 2020.
[28] See, eg, ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 at [164] (Gummow and Hayne JJ); *APRA* (2007) 226 CLR 630 at [14] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Telstra* (1999) 197 CLR 61 at [22] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority and* ***Henderson*** (1997) 190 CLR 410 at 472 (Gummow J); *SASB* (1996) 189 CLR 253 at 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 277, 294 (McHugh and Gummow JJ); ***Jacobsen*** *v Rogers* (1995) 182 CLR 572 at 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

that has built up around the certainty and stability of the principle, rather than its original rationales. That follows because, if a legislature wishes to extend criminal offences to government entities, *Cain v Doyle* does nothing to prevent it from doing so. AAPA's case for re-opening depends in large measure on an overstated assertion that *Cain v Doyle* is a strict rule of construction. However, the principle is, and has always been, a rebuttable presumption (as Dixon J made clear in *Cain v Doyle* itself). It is thus a tool of construction in the search for legislative intention that may be rebutted by evidence of a contrary intention in the usual way.[29] The difference between the *Cain v Doyle* presumption and the general presumption in *Bropho* is only one of degree: more is generally required to rebut the *Cain v*
10 *Doyle* presumption than the *Bropho* presumption, because to attribute criminal liability to the Crown is a more serious matter than to subject the Crown to civil norms.[30] It requires "the clearest indication of legislative purpose" to do the former.[31]

29. Contrary to **AS [26]**, the Full Court did not apply *Cain v Doyle* as an inflexible rule. It observed that the Sacred Sites Act did not expressly provide that offence provisions bind the Commonwealth (**J [72]-[73], CAB 80-81**), but that was not the end of the analysis. The Full Court considered what the context disclosed about the legislative intention in respect of attributing criminal liability to the Commonwealth (**J [74]-[78], CAB 82-85**), having already determined that the DNP was intended to have the same legal status as the Commonwealth in relation to the imposition of criminal liability by a statute enacted by the legislature of
20 another polity (**J [50]-[69], CAB 64-79**), and recognising that an "anterior determination" of whether the Sacred Sites Act evinces an intention to impose criminal liability on the Commonwealth was required: **J [69], CAB 79**. The Full Court correctly concluded that the legislative history made it "not possible to make the necessary implication that it is intended to impose criminal liability on the Commonwealth executive": **J [80], CAB 86**.

30. The fact that the *Cain v Doyle* presumption is a rebuttable presumption, rather than a rigid rule of law, has the result that many of the reasons advanced in support of overruling *Cain v*

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[29] See, eg, *Tomaras* (2018) 265 CLR 434 at [52] (Gordon J), [100]-[109] (Edelman J).
[30] See *Henderson* (1997) 190 CLR 410 at 472 (Gummow J).
[31] *Telstra* (1999) 197 CLR 61 at [22] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). See also *Wurridjal* (2009) 237 CLR 309 at [164] (Gummow and Hayne JJ); *APRA* (2007) 226 CLR 630 at [14] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *SASB* (1996) 189 CLR 253 at 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 294 (McHugh and Gummow JJ).

Doyle (especially **AS [37]-[39]**) fall away. The other submissions based on "equality before the law" (especially **AS [40]-[44]**) are unpersuasive. Criminal offences *can* be framed to apply to governments, so there is no inequality. Statutory corporations have artificial personality and there is no necessity that they be treated the same as natural or other corporate persons. It is a question of intention from corporation to corporation. The growth of governmental activity simply means that the question might arise in many different contexts. AAPA's example of workplace health and safety laws exemplifies the point: the uniform Work Health and Safety law expressly provides that the Crown is liable for an offence against the Act.[32] There is no sufficient reason to reverse the direction of the longstanding rebuttable
10 presumption. Doing so would cause considerable inconvenience and uncertainty.

31. Further, there are continuing justifications for the presumption. Particularly in an intergovernmental context, the *Cain v Doyle* presumption finds modern justification in principles of federal comity and democratic accountability. In a federation, where one does "not expect to find either government legislating for the other",[33] there is a "presumption that the legislature of a member of a federation does not intend its legislation to apply to another member of the federation".[34] If one polity *does* intend to subject another polity within the federation to criminal liability if that second polity breaches standards selected by the first, it is appropriate that the first polity explicitly confronts and exposes to debate its intention to do so. That is why the *Cain v Doyle* presumption applies to the benefit of polities other than
20 the enacting polity,[35] and does so very strongly:[36] cf **AS [47]**.

32. It may be accepted that the Commonwealth has, in respect of instrumentalities that it creates, the legislative power to immunise those instrumentalities from criminal liability imposed by the legislatures of the States or Territories (see **AS [48]-[49]**). However, this Court expressly rejected an argument that the existence of Commonwealth legislative power to protect its

[32] See, eg, s 10(2) of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT).
[33] *In re Richard Foreman & Sons Pty Ltd; Uther v FCT* (1947) 74 CLR 508 at 529 (Dixon J).
[34] *Jacobsen* (1995) 182 CLR 572 at 601 (McHugh J).
[35] See *Telstra* (1999) 197 CLR 61 at [21]-[23] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *SASB* (1996) 189 CLR 253 at 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 277, 294 (McHugh and Gummow JJ). See also *Mining Act Case* (1999) 196 CLR 392 at [32] (Gleeson CJ and Gaudron J).
[36] *Henderson* (1997) 190 CLR 410 at 472 (Gummow J). See also *Mining Act Case* (1999) 196 CLR 392 at [228] (Hayne J, McHugh J agreeing); *AGU* (2013) 86 NSWLR 348 at [29] (Basten JA); *Bradken* (1979) 145 CLR 107 at 122-123 (Gibbs ACJ), 129 (Stephen J), 136 (Mason and Jacobs JJ).

capacities weighed against the need for constitutionally implied immunities.[37] For similar reasons, Commonwealth legislative supremacy of itself supplies no reason to abolish interpretive presumptions in favour of the Commonwealth. Further, if it be accepted that the presumption applies as between States, or between States and Territories (where there is no principle of supremacy that can supply the circuit-breaker on which AAPA's argument is premised), there is no warrant for applying a different interpretation to the Commonwealth. Otherwise, Commonwealth authorities would be bound by State or Territory offence provisions unless the Commonwealth legislated to the contrary, whereas State and Territory authorities would not be bound by the same legislation. AAPA's argument also ignores the
10 applicability of *Cain v Doyle* in determining whether the Commonwealth itself and Commonwealth authorities can commit offences against Commonwealth legislation.

33. In circumstances where: **(1)** this Court has repeatedly restated the *Cain v Doyle* presumption without qualification or the expression of any doubt as to its correctness,[38] including in modern times post-dating "activities of the executive government reach[ing] into almost all aspects of commercial, industrial and developmental endeavour";[39] **(2)** legislative bodies are aware of and have for decades framed legislation in reliance on the presumption; **(3)** the presumption may be rebutted when a contrary intention is clearly demonstrated; and **(4)** federal comity and democratic accountability are promoted by the retention of the presumption; *Cain v Doyle* should not be re-opened or overruled (cf **AS [36]-[46]**).

20 34. Alternatively, if *Cain v Doyle* is overruled, the Court should make clear that, when construing provisions enacted before that overruling, courts should "take account of the fact that [the *Cain v Doyle* presumption] was seen as of general application at the time"[40] those provisions were enacted. That is appropriate because the *Cain v Doyle* presumption, like other presumptions of statutory interpretation, is "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted".[41] Any change to such a working hypothesis should be signalled to the other

[37] *Spence v Queensland* (2019) 268 CLR 355 at [102]-[103] (Kiefel CJ, Bell, Gageler and Keane JJ).
[38] See the cases cited above n 28.
[39] *Bropho* (1990) 171 CLR 1 at 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[40] *Bropho* (1990) 171 CLR 1 at 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[41] *Electrolux Home Products Pty Ltd v AWU* (2004) 221 CLR 309 at [21] (Gleeson CJ). See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

arms of government *before* it is applied by the courts.[42] For a court to take that approach would not involve "prospective overruling".[43] It would simply be to give proper expression to the constitutional relationship between the arms of government,[44] the duty of the court being to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.[45] Of course, if *Cain v Doyle* were to be overruled on this basis, the construction of the Sacred Sites Act adopted by the Full Court should not be disturbed.

C. THE DNP IS NOT SUBJECT TO CRIMINAL LIABILITIES TO WHICH THE COMMONWEALTH ITSELF IS NOT SUBJECT

Principles

10 35. The Commonwealth Parliament can create a statutory corporation that is not bound by any statute that is not binding upon the Commonwealth body politic itself.[46] AAPA accepts that this is so: **AS [49]**. In the context of this appeal, the efficacy of such legislation does not depend on repugnancy with the Sacred Sites Act, because the Sacred Sites Act itself, when properly construed, does not seek to impose criminal liability on Commonwealth authorities or instrumentalities of that kind (section B above). The determinative question is therefore whether, as a matter of Commonwealth law, the DNP is "intended to have the same legal status as the executive government".[47]

36. The Full Court correctly stated the applicable principles of statutory construction: **J [47]-[48]**; **CAB 62-63**. In particular, it correctly accepted a number of propositions drawn from

20 *SFIT*.[48] That case concerned whether SFIT, a Commonwealth statutory corporation, could claim an exemption under South Australian stamp duty law for conveyances or transfers "to the Crown, or to any person on behalf of the Crown". One step in the analysis was whether SFIT was the Crown in right of the Commonwealth. Of the judges who dealt with that step,

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[42] *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
[43] It would not create or alter existing rights and obligations or maintain in force that which is acknowledged not to be the law: *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 (Brennan CJ, McHugh, Gummow and Kirby JJ; Dawson, Toohey and Gaudron JJ agreeing at 515).
[44] *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
[45] *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby and Hayne JJ).
[46] See, eg, *Telstra* (1999) 197 CLR 61 at [19]-[23] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *SASB* (1996) 189 CLR 253 at 277 (McHugh and Gummow JJ).
[47] *Mining Act Case* (1999) 196 CLR 392 at [33] (Gleeson CJ and Gaudron J).
[48] *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (***SFIT***) (1979) 145 CLR 330.

Mason J (Barwick CJ relevantly agreeing, although dissenting in the result for other reasons) held that SFIT was the Commonwealth, while Stephen and Aickin JJ held that it was not. However, despite that divergence within the Court as to the application of the relevant principles to SFIT, the principles themselves were substantially agreed. In particular, there was no dispute that the inquiry is to be carried out as a matter of "statutory interpretation rather than any mechanical application of supposed tests".[49] Three principles emerged that inform whether an agency or instrumentality should be regarded as part of the Executive for the purpose of determining whether it is bound by laws that do not bind the Executive.

37. ***First***, it is a neutral factor that the body in question is incorporated.[50] Some incorporated bodies are, and others are not, part of the Executive government, it being well recognised that "Parliament may set up a corporation to carry out any of the executive functions of government on the footing that it is an agency or instrumentality of government".[51] Indeed, since before Federation it has been recognised that governmental functions might be carried out through statutory corporations "for the convenience as well of management as of the assertion and enforcement of contractual rights in respect of the commercial transactions" entered into by those corporations,[52] rather than because of any intention to divorce the activities or the corporation from the executive government.

38. ***Secondly***, "the presence or absence of control by the executive government" is centrally important.[53] A high degree of control favours a conclusion that the corporation "be itself treated as the alter ego of the Crown, enjoying accordingly those immunities and privileges with which the Crown is clothed".[54] The relevant control includes both control over membership of the body, and control over its activities.[55] As to the former, the appropriate

[49] *SFIT* (1979) 145 CLR 330 at 347 (Stephen J).
[50] *SFIT* (1979) 145 CLR 330 at 342 (Stephen J).
[51] *State Bank (NSW)* (1992) 174 CLR 219 at 232 (the Court). For example, in *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 38, the plurality (Mason, Wilson, Brennan, Deane and Dawson JJ) held that the Commissioner of Railways was an instrumentality of the State "through which the executive government of the State discharges an important part of its governmental functions". See also at 28 (Gibbs CJ).
[52] *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 535 (Griffith CJ), quoted in *ACTEW* (2011) 244 CLR 530 at [23] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[53] *SFIT* (1979) 145 CLR 330 at 348 (Stephen J).
[54] *SFIT* (1979) 145 CLR 330 at 348 (Stephen J).
[55] *SFIT* (1979) 145 CLR 330 at 354 (Mason J), 365 (Aickin J).

focus is on whether a person is "appointed at the will of the executive government", meaning that even membership of an instrumentality for a fixed term does not necessarily detract from the degree of control that may be exerted by the executive, especially where there is a possibility of re-appointment.[56] It is "the existence of the statutory ability to control, or its absence, that is to be looked at" and not "any examination of the actual extent to which particular actions are or are not the result of the exercise of control by the executive".[57]

39. ***Thirdly***, it is relevant to consider whether the type of function which a corporation performs is a governmental function.[58] The presumption against binding the Crown "extends to confer prima facie immunity in relation to the activities of government instrumentalities or agents
10 acting in the course of their functions as such".[59] It may also be relevant to consider the funding of the body and its relation to the Consolidated Revenue,[60] as well as the corporation's financial and other accountability to the Commonwealth.[61]

40. The above principles, in particular the importance of analysing the *control* and *functions* of the corporation, are confirmed in more recent cases referring to "the functions of the body in question and the degree of control exercisable over it by the executive government".[62]

41. AAPA's submission (**AS [49]**) that the privileges and immunities of the body politic can be conferred on a statutory corporation only by express provision is inconsistent with corporate status being a "neutral factor". ***Townsville*** *Hospitals Board v Townsville City Council* does not support it. Chief Justice Gibbs' statement in that case that, absent express provision,[63] "it
20 should not readily be concluded"[64] that the legislature intended to confer the privileges and immunities of the body politic on a corporation, rises no higher than to say that an implied

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[56] See, in the analogous context of disqualification for holding an office of profit "under the Crown", *Re Lambie* (2018) 263 CLR 601 at [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[57] *SFIT* (1979) 145 CLR 330 at 348 (Stephen J).
[58] *SFIT* (1979) 145 CLR 330 at 349 (Stephen J), 355 (Mason J), 365, 371 (Aickin J).
[59] *Bropho* (1990) 171 CLR 1 at 15-16 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[60] *SFIT* (1979) 145 CLR 330 at 349 (Stephen J).
[61] *SFIT* (1979) 145 CLR 330 at 354 (Mason J).
[62] *ACTEW* (2011) 244 CLR 530 at [26]-[27] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), referring to *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at [26]-[27], [53] (McHugh, Gummow and Heydon JJ) and *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [164] (McHugh ACJ, Gummow, Callinan and Heydon JJ).
[63] As to the ambiguity of the meaning of "express" see *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 97 ALJR 276 at [23] (the Court).
[64] *Townsville* (1982) 149 CLR 282 at 291 (Gibbs CJ, Murphy, Wilson and Brennan JJ agreeing).

intention would need to be fairly clear. That an implied intention may be sufficient is confirmed by the fact that, immediately after making the above statement, Gibbs CJ went on to consider whether the Act in question did "impliedly so provide".[65] In any event, the cases cited above have proceeded, consistently with *SFIT*, by emphasising the significance of control by the executive government, and the governmental character of a corporation's functions, in determining whether a body corporate is bound by laws that do not bind the Executive, without any requirement for that issue to be addressed by express provision.

Application of principles

42. AAPA mounts no real attack on the Full Court's analysis of the legal status of the DNP at **J [50]-[69]**; **CAB 64-79**, save to confess and avoid by submitting that 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": **AS [51]**. That submission should not be accepted, the Full Court's analysis being plainly correct.

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43. ***Control***: A person is to be appointed as the DNP by the Governor-General, provided the Minister is satisfied as to the person's suitability: s 514F. The DNP may also hold an office or be employed in the Australian Public Service: s 514F(3). At all material times, the DNP was also head of the Parks Australia division of the relevant Commonwealth Department, and was included on departmental organisation charts (**CAB 24 [11]; AGFM 5-8**). Appointment is for a fixed term and for fixed remuneration: ss 514H, 514J. The appointment may be terminated by the Governor-General (on advice), but on limited grounds: s 514P. Matters such as outside employment, leaves of absence, and matters not covered by the EPBC Act are within the control of the Minister or the Governor-General (on advice): ss 514K, 514M, 514Q.

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44. The DNP must perform its functions and exercise its powers "in accordance with any directions given by the Minister", unless the EPBC Act provides otherwise: s 514D(1). In reliance on the words "unless the Act provides otherwise", and s 362(2), which requires compliance with management plans, the Aboriginal parties submit that the Minister's power of direction is "constrained, if not displaced" by the Kakadu Management Plan (**KMP**): **NLC**

[65] (1982) 149 CLR 282 at 291-292 (Gibbs CJ).

[36]. However, a management plan must "specify any limitation or prohibition on the exercise of a power … under an Act … in relation to the reserve" (emphasis added): s 367(1)(e); see also s 362(3). The KMP does not do so. As such, the Minister's power to give directions is "constrained" only in the sense that no direction could require the DNP to act inconsistently with the management plan. In circumstances where the management plan is a legislative instrument made by the Minister,[66] that is hardly indicative of the DNP's "legal autonomy". Furthermore, the DNP relies on the staffing and resources provided by the Department to carry out its functions (**CAB 25 [14]**). The Parks Australia division, which is staffed by departmental employees engaged under the *Public Service Act 1999* (Cth) (**CAB 25 [13]**), not only supports the DNP in the exercise of its functions and powers, but also provides policy advice to the Minister in relation to the management of Commonwealth reserves (**CAB 25 [12]**). The Minister can delegate any of her powers or functions under the EPBC Act to the DNP: s 515.

45. The *National Parks and Wildlife Conservation Act 1975* (Cth) established the Australian National Parks and Wildlife Fund and vested it in the DNP: s 45. That fund is continued by the EPBC Act as the Australian National Parks Fund: s 514R. The fund includes, in addition to revenues raised through certain of the DNP's activities, "any money appropriated by the Parliament for the purposes of the Department and allocated by the Secretary for the management of Commonwealth reserves or conservation zones": s 514S(a). In practice, Departmental funds comprised the majority of the DNP's income: **AGFM 103, 195, 219-222**. The income of the Australian National Parks Fund, and the property and transactions of the DNP, are specifically exempted from Commonwealth and State taxation: s 514W.

46. Being a corporate Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***) (see ss 10 and 11 of the *PGPA Act* and s 514U of the EPBC Act), the DNP is subject to a high level of Commonwealth auditing and reporting oversight. For example, the DNP reports to the Minister on the DNP's

[66] Management plans must be prepared by the DNP in accordance with a procedure for public comment: ss 366-368. Disagreement between the DNP and any Board as to its content is ultimately resolved by the Minister: s 369. Management plans must ultimately be approved by the Minister, including with "any modifications the Minister considers appropriate", and they are disallowable legislative instrument: ss 370-371.

performance against Portfolio Budget Statements (**AGFM 13, 50**). The Australian National Audit Office audits the DNP's financial statements (**AGFM 100**).

47. Based on the above matters, the Full Court correctly recognised that the DNP is substantially under the control of the executive government in dimensions of appointment, Ministerial direction, staffing, funding, and accountability (**J [57]-[64]**; **CAB 69-75**).

48. ***Governmental functions***: The Commonwealth's entry into the administration, management and control of national parks was not an expansion into developmental activity in a general marketplace: **J [50]**; **CAB 65**. National parks, now called Commonwealth reserves, are those "appropriate to be established by the Australian Government, having regard to its status as a
10 national government",[67] which "picks up the notion of that Government's 'capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'".[68] The Commonwealth's entry into this field was an exercise of its nationhood power and implicated its relationships with other countries: **J [51]-[52]**; **CAB 65-66**. Indeed, the DNP's functions include cooperating with other countries as such, indicating its status as an emanation of the Commonwealth body politic itself.[69] Even the DNP's day-to-day management and stewardship of Commonwealth reserves is correctly characterised as an "intrinsically executive governmental function[]" the discharge of which requires the DNP to pursue the national or public interest and to follow policies determined by the executive government: **J[57]**; **CAB 69**.

20 49. ***"Activities in suit"***: Even if attention were to be confined to the activities in suit (an approach that would lose sight of the fact that the issue is one of statutory construction), the DNP was performing governmental functions. AAPA submits that the "relevant function was to erect structures and carry out works on land leased for its joint management with Aboriginal people": **AS [51]**. That inadequately describes the activities. The KMP records the "Objective" of "joint management" as "a strong and successful partnership between Bininj/Mungguy and the Australian Government (as represented by the [DNP])": **IBFM 103, 104** (emphasis added). Under the KMP, no-one other than the DNP is permitted to provide walking tracks in Kakadu National Park: at [9.4] and [10.7.3]; **IBFM 208 and 246**. Further,

[67] *National Parks and Wildlife Conservation Act 1975* (Cth) (repealed) s 6(1)(a).
[68] *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 at 562 (Gaudron J, Toohey J agreeing at 560-561).
[69] Section 514B(1)(c) of the EPBC Act.

the contract for the works in question records that the walking track was "identified as a priority for upgrade by the Kakadu Board of Management", that the "track surface is uneven and eroding and has extruding boulders", and that the track gradient was "steep in sections": **AGFM 227**. The re-alignment and upgrade was directed to remedying these safety issues on the track. The DNP was engaged in its governmental function of managing the national park, to address safety concerns raised as a "priority" by the joint management board.

50. Contrary to **AS [54]** (see also **NLC [49]**), the legislative history of s 4 of the EPBC Act does not support AAPA's submissions. The EPBC Act regulates a wide range of development activity all across the country, including potential commercial development activity by government business enterprises. That explains the general contemplation in the Supplementary Explanatory Memorandum that corporate entities might be subject to criminal prosecution. It was not speaking to the potential criminal liability of the DNP, let alone to its liability to criminal laws of *a different polity*.

51. Contrary to **AS [55]** (see also **NLC [37]**), the exposure of the DNP to specific criminal liabilities for heritage offences under s 354A of the EPBC Act says nothing about the DNP's liability for Territory offences. On the contrary, s 354A(10) and (11) illustrates the Commonwealth Parliament carefully tailoring offences, coupled with specific defences, appropriate for the DNP, which is otherwise not subject to general criminal laws. Similarly, the express immunities for authorised officers and rangers in s 498A of the EPBC Act is consistent with the position that *natural persons* would not otherwise be immune from the criminal law, even in the performance of their official functions.

Aboriginal parties' submissions

52. The second respondent does not oppose the Aboriginal parties' application for leave to intervene in the appeal. Their submissions have been addressed in part above.

53. Contrary to **NLC [32]-[33]**, the DNP's obligations under the Lease, Access Protocols, and KMP do not undermine the Full Court's conclusion. No provision of the Lease could make the DNP subject to Territory criminal law, that being a matter that depends on statute. An obligation in the Lease to comply with applicable laws (cl 9(h); **IBFM 13**) cannot answer the question *what laws* are applicable to the DNP. The Access Protocol made under cl 25 of the Lease does not require the DNP to comply with the Sacred Sites Act and, even if it did, breach

of that obligation would not attract criminal penalties. Finally, as to the KMP, Part 9.5 (which refers to the requirement under the Sacred Sites Act to obtain an Authority Certificate) is a part of the plan which relates to a range of activities undertaken by Bininj/Mungguy and the private sector (as well as the DNP): **IBFM 210-211**. It cannot, and does not purport to, make that Act applicable to the DNP: **J [68]; CAB 78**.

54. Contrary to **NLC [39]-[44]** (see also **AS [56]**), the Territory's legislative power under the Land Rights Act is not in issue. The issue is whether the Sacred Sites Act reveals a legislative intention to bind the DNP to its criminal norms, in circumstances where it does not bind the Commonwealth to those norms. The amplitude of legislative power conferred on the
10 Territory is irrelevant to that issue. The Commonwealth's case is not that the Sacred Sites Act does not apply to Aboriginal land (cf **NLC [43]**), but that it does not impose criminal liability on the DNP. Finally, contrary to **NLC [45]-[48]**, s 10(4) of the Land Rights Act is irrelevant. That it deems certain land held by the DNP to be held by the Crown in right of the Commonwealth simply reflects the fact that the DNP has separate legal personality.

55. The second respondent does not seek costs, and notes that costs are not sought against him (**AS [58]**).

PART VI ESTIMATED TIME

56. The second respondent seeks up to 3 hours to present oral argument.

Dated: 14 August 2023

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20 Counsel for the Second Respondent

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

CHIEF EXECUTIVE OFFICER,
ABORIGINAL AREAS PROTECTION AUTHORITY
Appellant

AND:

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DIRECTOR OF NATIONAL PARKS (ABN 13 051 694 963)
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General of the
20 Commonwealth sets out below a list of the statutes referred to in his submissions.

No.	Description	Version	Provision(s)
Statutory provisions			
1.	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)	13 March 2019 – 3 April 2019. Compilation No. 40 [C2019C00117]	s 10(4)
2.	*Environmental Protection and Biodiversity Conservation Act 1999*	29 October 2018 – 29 August 2019. Compilation No. 52 [C2018C00440]	ss 1-10, Pt 15 Div 4, Pt 19 Div 5, s 498A and s 515

3.	*Interpretation Act 1978* (NT)	As in force at 18 February 2019	ss 24AA(1), 38B
4.	*National Parks and Wildlife Conservation Act 1975* (Cth) (repealed)	As made	ss 6(1)(a), 45
5.	*Northern Territory Aboriginal Sacred Sites Act 1989* (NT)	Current	ss 4, 5, 19F, 34(1), 44-47
6.	*Public Governance, Performance and Accountability Act 2013* (Cth)	Current	ss 10, 11
7.	*Work Health and Safety (National Uniform Legislation) Act 2011* (NT)	Current	s 10(2)