



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Dec 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: D3/2023
File Title: Chief Executive Officer, Aboriginal Areas Protection Authority
Registry: Darwin
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 12 Dec 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

BETWEEN:

No. D3 of 2023

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

10

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

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

2. **The Facts:** The First Respondent (**DNP**) caused a walking track to be constructed on a sacred site in Kakadu without the required certificate from the Appellant: AS [7].

3. **The Appellant's construction:** The offence and penalty in s 34(1) of the *Sacred Sites Act 1989* (NT) (**SSA**) apply to all bodies corporate, including the DNP:

20

- (a) **Text:** Section 34(1) imposes a criminal norm enforceable as such upon all individuals and bodies corporate, but not bodies politic: *Interpretation Act 1978* (NT), ss 17, 24AA, 38B, supported by the stated penalties under s 34 itself: AS [16].

- (b) The DNP is a body corporate and so is bound: *EPBC Act 1999* (Cth), ss 514A and 514E(1): AS [6]. Conversely, the DNP is not a body politic. It is a legal person distinct from the Commonwealth body politic: *Hocking* (2020) 271 CLR 1, [75], [76], [126], [213]-[214]: AR [2]-[4], contra RS [9].

- (c) **Context:** The *SSA* was enacted under s 73(1)(a) of the *ALRA 1976* (Cth), which permits the Territory to make laws 'for the protection of...sacred sites' and 'regulating or authorising the entry of persons' (including individuals, bodies corporate and bodies politic: s 2C(1) of the *AIA 1901* (Cth)); such laws being limited to those capable of operating concurrently with Part 15, Div 4 of the *EPBC Act*. Part 15, Div 4 authorises the joint management of reserves by the DNP: AS [9]-[10].

30

(d) In ample exercise of the s 73 *ALRA* conferral of power, the *SSA* enacts a scheme whereby all aspects of access to, work on or use of sacred sites, by all persons is brought under the control of the Appellant in consultation with custodians to identify sacred sites and appropriate conditions to ensure their protection. Criminal sanctions play a central role in the scheme, effecting deterrence against all natural persons and all bodies corporate: AS [14]-[18].

(e) **Purpose:** The protective purposes of the *SSA* require that its generally expressed terms ('person', 'body corporate', 'natural person') be given their full, ordinary reach and that s 4(1) be taken to mean what it says: AS [14].

10 4. **The Full Court:** The Second Respondent (**AG**) persuaded the Full Court to approach the exercise of construction of the *SSA* differently: the *EPBC Act* expressed an (implicit) Commonwealth legislative intention that the DNP enjoyed the benefit a *Cain v Doyle* presumption against the imposition of criminal liability (FC [24]-[69]); and the *SSA* did not express, in the clearest of statutory language as required by *Cain v Doyle*, an intent to impose criminal liability on the executive government of the Commonwealth (FC [69]-[81]). In so doing, the Full Court did not apply the flexible *Bropho* approach to statutory construction; did not focus on the particular function of the DNP in question; nor identify the nature or extent of the *SSA*'s impairment of the legal position of the Commonwealth body politic/executive government: AS [11]-[13], [25]-[27], [46], [51].

20 5. **The AG's primary argument:** The AG now submits, 'independently' of any *Cain v Doyle* presumption, that he can succeed because s 4(2)-(4) of the *SSA* create a 'negative implication' that the 'bodies corporate' are not exposed to the criminal norms of the *SSA* if they are intended by another polity to be immune from any criminal liability to which that other polity is not itself subjected: RS [6], [10]-[21]. Sections 4(2)-(4) convey no such tortured, and inherently uncertain, negative implication. They build off the existing premises that (i) the "Crown" in all of its capacities is bound by the *SSA*; (ii) all bodies corporate and natural persons are liable to prosecution under s 34(1); but (iii) bodies politic are not liable to prosecution. Sections 4(2)-(4) go further with the Territory itself – creating a mechanism to prosecute *the body politic itself*, including its unincorporated emanations – *as if it were a body corporate*. Taking that further step against itself does not frustrate the existing work of ss 4(1) and 34: AS [25]; AR [5]. Legislative history requires no different result: AS [22]-[24].

30

6. **The AG's alternative argument:** This Court should reject the mode of reasoning of the AG (adopted by the Full Court) deploying *Cain v Doyle*:

(a) The legislative intent of the Territory should have been the controlling focus of the enquiry, rather than Commonwealth legislative intent: AS [25].

(b) Contra FC [42], "authorities and considered *dicta* binding on the Full Court" do not establish that the elevated *Cain v Doyle* presumption applies to "government instrumentalities intended to have the same status as the Executive Government": AS [45]; AR [7]. Dixon CJ's reasoning did not form a majority, and in any event did not speak beyond the Crown as body politic. *Telstra* and *Wurridjal* are similar limited. SASB contains no majority holding of when, or why, a statutory corporation would have the benefit of this presumption. *Bropho* did not need to decide the question.

(c) There is but one presumption, the flexible *Bropho* presumption. The presumption is that a parliament does not intend to impair the legal position of a body politic or its executive government (*Tomaras* at [18], [52]-[54], [107]). The elevated standard of *Cain* is but one possible working out of the flexible enquiry; where a parliament seeks to impose criminal norms on a body politic: AS [13], [46]; AR [10]. This approach is not precluded by Commonwealth drafting practice; it is consistent with it: AR [11].

(d) The rights, privileges and immunities of the DNP as a separate legal entity are the immediate product of federal legislation and protected by ss 109/122. The DNP is not an addition to the executive government of the Commonwealth under s 61. The DNP does not attract its own *Cain v Doyle* presumption: AS [48]-[50];

(e) Focussing on the precise function and powers of the DNP regulated by the SSA reveals no legal impairment of the Commonwealth body politic or executive government. The SSA is no more than a law of general application which might govern an activity in which the DNP chooses to enter in the exercise of statutory functions: FC [89]. The presumption is thus at best weak and readily rebutted by the comprehensiveness and intended uniformity of operation of the SSA (*Tomaras* at [23]): AS [13], [46].

7. **The EPBC Act:** While unnecessary to reach, the *EPBC Act* falls far short of conveying an implied intent, to the high standard required by *Townsville Hospital Board*, that the Commonwealth Parliament intended to immunise the DNP from Territory law when carrying out the functions in question here: AS [51]-[56]; AR [12]-[13].

Date: 12 December 2023


Justin Gleeson SC