



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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BETWEEN:

**Chief Executive Officer,
Aboriginal Areas Protection Authority**

Applicant

and

Director of National Parks

First Respondent

Attorney-General of the Commonwealth

Second Respondent

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INTERVENERS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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. **Issue:** In terms, the *Sacred Sites Act JBA2/8 (SSA)*, as a law of general application, applies to a body corporate who may use land comprised in a sacred site. On the basis that the penalty in s 34 would not apply to the Commonwealth as a body politic (AS[16]; RS[8]), the issue on the narrower appeal is whether, in the particular matter in which the impact of the provision is incurred, its application to the DNP would be, in legal effect, an application to the Commonwealth body politic: IS [7]-[9], [18]-[31]; *McNamara* (2005) 221 CLR 646 at [7], [23], [65] **JBA4/30** cf J [56]-[57] **CAB 68-9**.

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3. The particular matter is the joint management of a Commonwealth reserve on indigenous people's land leased under the *Land Rights Act* (s 12(2B) **JBA1/1**) for the purposes of Pt 15 Div 4 of the EPBC Act that is subject to a management plan: ss 363(3)-(5), 376, 514B(1)(a) **JBA2/5**; SCS [1]-[9], [20]-[21A] **CAB 23-7**; Gunlom Lease **IBFM 5**; Kakadu Management Plan **IBFM 61**.

4. It is not difficult for Parliament to provide in express terms that a corporation may have the privileges or immunities of the Crown (body politic), and where it does not do so, it should not be readily concluded that the corporation impliedly has those privileges. In any event, several features here strongly tell against that result in the particular matter: IS [28]-[29]; *Townsville Hospital Board* (1982) 149 CLR 282 at 291 **JBA6/39**.

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5. **Control is hedged:** A ministerial power to direct activities under s 514D(1) of the EPBC Act is hedged, and does not meet the high threshold level of control by which the application of s 34 of the SSA to the DNP might impair the legal situation of the Commonwealth body politic. The DNP does not, in the particular matter, act merely at

the behest or only in the interests of the Commonwealth: IS [36]; *Townsville Hospital Board* at 289; *McNamara* at [27]; *Queanbeyan CC* (2011) 244 CLR 530 at [29], [33] **JBA5/32**; cf J [57] **CAB 69**:

- 10 5.1. The DNP must consult and have regard to the views of the Aboriginal Land Council established under the *Land Rights Act* for the area: s 514D(2)(b).
- 5.2. The DNP must perform its functions in accordance with its obligations under the Lease, if a management plan is not in operation, and must give effect to an operative management plan, and the Commonwealth or a Commonwealth agency (defined to include a Minister: s 528) must not perform their functions inconsistently with the Lease and any operative management plan: ss 357, 362.
- 5.3. The majority indigenous Board makes decisions on the management of the reserve that are consistent with the management plan, and in conjunction with the DNP prepares the plan, monitors the management of the reserve, and advises the Minister on its future: ss 376-377.
- 5.4. The management plan must be consistent with the Lease and is prepared taking into account the interests of traditional owners and views of the Aboriginal Land Council, with special planning rules for Kakadu: ss 367(1)(d), 368, 390. The instruments provide for sacred site clearances (SSA Authority certificates) before works: Plan Table 4 **IBFM 212**, Lease Access Protocol cl 21 **IBFM 46**.
- 20 6. **Not a Commonwealth “vehicle”**: The incorporation of the DNP is not a device for the Commonwealth to deal with Aboriginal land to manage as a reserve under the EPBC Act: IS [38], [45]-[48] cf J [55], [57], [65] **CAB 67, 69, 75**; RS [7], [37]; see [5] above and EPBC Act s 514D(5)(b):
- 6.1. On proclamation of the park under the former NPWC Act **JBA3/18**, any interest in the land held by the Commonwealth vested in the DNP: NPWC Act s 7(7) (see now EPBC Act s 345A).
- 6.2. The land became Aboriginal land on being leased to the DNP by the Land Trust for the purposes of the NPWC Act upon which any previous interest of the DNP ceased to exist: SCS [21A] **CAB 27**; *Land Rights Act* former ss 12(2A)-(2E), 19(1A), (3); s 3(1) *Authority* **JBA3/13** (now s 12(2A)-(2B) **JBA1/3**).
- 30 6.3. The proclamation under the NPWC Act continues as if made under s 344 of the EPBC Act and declared as a reserve under that Act: SCS [20] **CAB 26**; *Environmental Reform (Consequential Provisions) Act 1999* (Cth) Sch 4 item 3.

6.4. If the Lease ends, the land ceases to be part of the reserve. If the reserve proclamation is revoked, the DNP's interest in the Lease ceases to exist and does not, unlike other interests held by the DNP, vest in the Commonwealth: EPBC Act ss 350(4), 352(2) (NPWC Act s 7(10)-(10B)).

The legislative history confirms that the DNP is not some vehicle through which the Commonwealth manages a reserve on Aboriginal land: IS [49].

7. **Legislative coherence:** Construing the *Land Rights Act* and EPBC Act together, it makes little sense if the DNP were, by implication, immune from the penalty in s 34 of the SSA in respect of its joint management of Kakadu:

10 7.1. Sections 73(1)(a) and 74 of the *Land Rights Act* clear the field for the Territory to enact laws protecting, and authorising the entry of persons onto, sacred sites on Aboriginal land, provided any such law is capable of operating concurrently with that Act and Part 15 Div 4 of the EPBC Act (leased reserves). This complements the sacred site offence in s 69 that excepts actions under that Territory law (s 69(2A) cf s 70(2); SSA ss 25, 44), and s 74(2) allows application of like offences under Territory law: IS [39]-[44]. The EPBC Act s 354A offences do not exhaust the DNP's criminal liability for actions in a reserve: cf RS [51].

20 7.2. The certificate provisions of the Territory law to avoid harming sacred sites apply, in terms, to the DNP as a lessee of land (ss 19B, 22, 25, 44; s 3 *owner*; RS [21]) and permit acts that would otherwise contravene ss 33-35 of that law and s 69 of the Commonwealth law. Sections 69, 73 and 74 of the *Land Rights Act* are inconsistent with any implication that the DNP is immune from the penalty in the Territory law when jointly managing a reserve on Aboriginal land leased under that Act: cf RS [54].



12 December 2023

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