



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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BETWEEN:

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

and

**Director of National Parks**

First Respondent

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**Attorney-General of the Commonwealth**

Second Respondent

### PROPOSED INTERVENERS' SUBMISSIONS

#### Part I: Certification

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

#### Part II: Basis of proposed appearance

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2. The Northern Land Council (NLC), the Gunlom Aboriginal **Land Trust**, and Joseph and Billy Markham (together, the **Aboriginal parties**) seek leave to intervene to support the Appellant on grounds 2.2, 2.3 and 2.5: notice of appeal **CAB 105**. These are expressed as particulars of ground 1 that the Full Court erred in holding that *Cain v Doyle* (1946) 72 CLR 409 requires that the reference to a body corporate in s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) be construed so as not to include the body corporate that is the **Director** of National Parks.

#### Part III: Reasons for granting leave to intervene

3. The Aboriginal parties were given leave to appear as amicus curiae in the Full Court and to intervene in the special leave application in this Court.<sup>1</sup> The issues in the appeal affect their legal interests, similar to the position of the Anangu Pitjantjatjaraku in the management of Pitjantjatjaraku lands given leave to intervene in *Gerhardy v Brown*.<sup>2</sup>
4. The NLC is a Land Council established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to represent the interests of Aboriginal peoples in relation

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<sup>1</sup> *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTFC 1 (Grant CJ, Southwood and Barr JJ) (**J CAB 33**); [2023] HCATrans 068 (Gordon, Edelman and Gleeson JJ).

<sup>2</sup> (1985) 159 CLR 70, cited in *Levy v Victoria* (1997) 189 CLR 579 at 602 fn (76) (Brennan CJ).

to land within the area of the NLC, being the northern half of the Northern Territory, which includes the Gunlom area within **Kakadu** National Park. Its functions include to assist Aboriginals in the protection of sacred sites and to negotiate with persons desiring to obtain an estate or interest in Aboriginal land: s 23(1)(ba), (d), (e).<sup>3</sup>

5. The Land Trust is established under the *Land Rights Act* to hold title to land vested in it under the Act for the benefit of the Aboriginals concerned in the land: ss 4–5. It holds a fee simple title to the Gunlom area, which, as required by the *Land Rights Act*, is leased to the Director, initially to enable the Director to hold that land, as part of Kakadu,<sup>4</sup> for the purposes of the *National Parks and Wildlife Conservation Act 1975* (Cth) (the **NPWC Act**), and now for the purposes of Part 15 Division 4 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) dealing with Commonwealth reserves (parks).
6. Joseph and Billy Markham are traditional Aboriginal owners, within the meaning of the *Land Rights Act*, of the Gunlom area, and are custodians, within the meaning of the *Sacred Sites Act*, of the sacred site that is the subject of the complaint made against the Director under s 34 of that Act for works done without a certificate under that Act.<sup>5</sup>

#### **Part IV: Submissions**

##### **A. Summary of argument**

7. The Aboriginal parties seek to supplement the Appellants’ (narrower) case that the Full Court erred in applying *Cain v Doyle* (AS [48]). Their submissions address the steps in the Full Court’s reasons that the Director is immune from prosecution under s 34 of the *Sacred Sites Act* because, according to the Full Court:

- 7.1. the Director’s “functions are directed to the stewardship and management of Commonwealth places”: **J[57] CAB 69**;
- 7.2. in discharging its functions, the Director is to “follow policies determined by the executive government”: **J[57] CAB 69**;

<sup>3</sup> The governance, representative character, and functions of the NLC were considered by this Court in *Northern Land Council v Quall* (2020) 271 CLR 904. It has represented Aboriginal peoples in numerous land rights cases and has appeared as intervener in cases such as *Wik Peoples v Queensland* (1996) 187 CLR 1 and *Yanner v Eaton* (1999) 201 CLR 351.

<sup>4</sup> See Kakadu National Park Management Plan, Part 1.3, Figure 3 and Appendix I: Special Case (SC) document 13; Interveners Book of Further Materials **IBFM 80, 83, 295**.

<sup>5</sup> Affidavit Shelley Landmark 8 November 2022 at [12], filed in the special leave application.

7.3. the “statutory scheme is for the Commonwealth to administer, manage and control Commonwealth reserves through the Director, rather than for the incorporation of the Director to perform its functions independently of the Commonwealth”: **J[65] CAB 75**; and

7.4. as a result, the Director is an “instrumentality or authority intended to have the same legal status as the executive government of the Commonwealth in relation to the imposition of criminal liability”: **J[69] CAB 79**.

8. In short, the Full Court characterised the incorporation and functions of the Director as a “vehicle” or “convenient device” for the Commonwealth to deal with interests in land within Commonwealth reserves: **J[55], [57] CAB 67, 69**.

9. The Full Court’s conclusion cannot be sustained because:

9.1. There is no relevant provision that extends to the Director, as a body corporate with a distinct legal personality, the privileges and immunities of the body politic traditionally expressed as the Crown in right of the Commonwealth, upon which a *Cain v Doyle* type interpretive presumption depends: see Part IVC.

9.2. Even if, absent express provision, such an interpretive presumption could extend to a body corporate, such an implication cannot be drawn here because the claim for immunity from prosecution under s 34 of the *Sacred Sites Act* arises where:

(1) The relevant function performed by the Director is to jointly manage a reserve on indigenous people’s land held under lease, which must be performed in accordance with the lease and management plan, not by Ministerial direction, and those instruments impose on the Director obligations that are inconsistent with the claimed immunity: see Part IVD.

(2) The lease granted to the Director under the *Land Rights Act* to enable the Director to hold the land for the purposes of Part 15 Division 4 of the EPBC Act is not held by the Director for or on behalf of the Commonwealth (or the Crown in right of the Commonwealth) and concerns Aboriginal land in relation to which reciprocal Territory criminal laws for the protection of sacred sites apply: see Part IVE.

## 30 **B. Contextual background**

10. The Aboriginal parties adopt the factual and legislative background at AS [5]–[10], [14]–[24] with the following supplementation.

Kakadu and *Buladjang* (Sickness Country) as Aboriginal land

11. For the Jawoyn People, the essence of *Bula*, a major figure of the creation era, is located within *Buladjang*, or Sickness Country, an area extending over 2,000 square kilometres. That takes in Gunlom Falls and its rock art which is associated with *Bula* as part of a network of sacred sites. Significant danger attaches to their disturbance.<sup>6</sup>
12. The Gunlom area was granted as Aboriginal land following the recommendation of the Aboriginal Land Commissioner on the hearing of a traditional land claim under s 50 of the *Land Rights Act*.<sup>7</sup>
- 10 13. The Gunlom area was, in that respect, deemed by former s 50(2B) to be unalienated Crown land available for claim notwithstanding that the interest held by the Commonwealth in respect of the land had vested in the Director pursuant to s 7 of the NPWC Act upon the proclamation of the Kakadu National Park under that Act. Under (former) s 12(2B)(b), (2C) and (2D)(b) of the *Land Rights Act*, the grant was subject to a condition that the NLC direct the Land Trust to grant a lease of the land to the Director to hold the land for the purposes of the NPWC Act.<sup>8</sup> On 20 May 1996, the Land Trust granted the Gunlom **Lease**<sup>9</sup> to the Director in accordance with s 19(1A) and (3) of the *Land Rights Act* in fulfilment of that condition.
- 20 14. On the commencement of the EPBC Act, Kakadu continued as a Commonwealth reserve under that Act, the plan of management under the NPWC Act continued as a plan under the new Act, and references in the *Land Rights Act* to a park and the NPWC Act, and to the Director constituted by that Act, were substituted with references to a Commonwealth reserve and the EPBC Act.<sup>10</sup>
15. Kakadu is a *jointly managed reserve* leased on *indigenous people's land* with a majority indigenous reserve board that makes decisions and plans of management for

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<sup>6</sup> Complaint at [4], [26]-[36] **CAB 6, 10-2**; *Buladajang (Sickness Country) Access Protocols*, definition and clause 10: SC document 12 **IBFM 41**.

<sup>7</sup> SC [21A] **CAB 27**; survey and search certificate SC documents 12A-12B **IBFM 50, 52**; *Jawoyn (Gimbat Area) Land Claim No.111/Alligator River Area III (Gimbat Resumption-Waterfall Creek) No.2 Repeat Land Claim No.142* (1995: Gray J). On the status of the land, see ALC Report [2.1]-[2.17] and *Newcrest Mining v Commonwealth* (1984) 46 FCR 342 at 347-8, 384-6 (French J)

<sup>8</sup> See ALC Report [6.4]. The terms of the *Land Rights Act* at that time are contained in Reprint No. 4 as at 30 April 1995.

<sup>9</sup> SC document 11 **IBFM 5**.

<sup>10</sup> *Environmental Reform (Consequential Provisions) Act 1999* (Cth) Schedule 4 items 3-4, 23-37.

the reserve, in conjunction with the Director: **J[63]–[64] CAB 74–5**; EPBC Act ss 363(3)–(4) (definitions), 374 (simplified outline).

The Lease and Management Plan: EPBC Act ss 357, 362, 367

16. The Gunlom Lease requires the Director to comply with a plan of management for Kakadu that is consistent with the Lease (clauses 9(a), 12–13 **IBFM 13, 20–21**), the EPBC Act requires the plan to be consistent with the Lease (s 367(1)(d)), and the Kakadu Management **Plan** makes provision in relation to sacred sites (Part 9.5 **IBFM 210**) reciprocating that in the Lease (clauses 9(y), 25 **IBFM 15, 28**). Each instrument requires the Director to comply with the procedures in the *Sacred Sites Act* in its use  
10 of the leased land: see further [32] below.

17. These instruments are given operation by the EPBC Act in the following way:

17.1. If a management plan is not in operation, the Director must exercise its powers and perform its functions in accordance with its obligations under the lease, and the Commonwealth or a Commonwealth agency must not perform its functions or exercise its powers inconsistently with the lease: s 357(1)(b), (2)(b).

17.2. If a management plan is in operation, the Director must exercise its powers and perform its functions to give effect to the plan, and the Commonwealth or a Commonwealth agency must not perform its functions or exercise its powers inconsistently with the plan: s 362(1)–(2).

20 *A Commonwealth agency* is defined to include a Minister: see s 528

The *Sacred Sites Act* is a law of general application

18. The *Sacred Sites Act* regulates the use of land in the Northern Territory by providing procedures for the protection of sacred sites (long title or preamble). The term *sacred site* is defined (s 4(1)) as having the same meaning given in the *Land Rights Act*, that is, a site that is sacred to Aboriginals or of significance according to Aboriginal tradition, and includes any land declared to be so under a law of the Northern Territory (s 3(1)), which picks up the registration provisions of the *Sacred Sites Act* (ss 27–29).

19. A person who proposes to use or carry out work on land may apply to the Aboriginal Areas Protection **Authority** for a certificate (s 19B), whereupon the Authority will  
30 consult with the Aboriginal custodians of sacred sites on or in the vicinity of the land (s 19F). The effect of a certificate, if granted, is that a person may enter or remain on,

and carry out work, on the relevant land (s 25). A *person* includes a body politic and a body corporate: *Interpretation Act 1978* (NT) s 17.

20. It is an offence if a person carries out work on a sacred site: s 34(1). Maximum penalties are prescribed in the case of a natural person (400 penalty units or 2 years' imprisonment) and in the case of a body corporate (2000 penalty units). It is a defence to a prosecution if the defendant carried out the work in accordance with a certificate given under the Act: s 34(2).
21. In terms, the *Sacred Sites Act*, as a law of general application regulating the use of land in the Territory, applies to a body corporate who may use land in the Territory. That application includes the protective offence provisions of the Act, as is made plain by the specification of a penalty in the case of an offence by a body corporate.
22. The question then becomes whether there is something in the constating legislation establishing the body corporate concerned, or in other legislation governing its use of land, that would displace such a law of general application.

### C. *Cain v Doyle* is prima facie inapplicable to a body corporate

23. The majority holding in *Cain v Doyle* was that the Commonwealth could not be convicted of an offence under the *Re-establishment and Employment Act 1945* (Cth) for unlawful termination of Mr Wright's employment at a factory administered by the Department of Munitions.<sup>11</sup> *Cain v Doyle* drew upon the immunity of the Crown from suit (the maxim that the Sovereign can do no wrong).<sup>12</sup> Professor Zines described the majority reasons as "unconvincing".<sup>13</sup> The case has been critiqued by others.<sup>14</sup> It has been held not to apply to civil penalties,<sup>15</sup> which bear similarities to modern welfare offences.<sup>16</sup> These are reasons why the appeal can be disposed of on the broader case that *Cain v Doyle* is out of step with contemporary standards: see AS [25]–[47]

<sup>11</sup> (1946) 72 CLR 409 (Latham CJ, Rich and Dixon JJ; contra Starke and Williams JJ).

<sup>12</sup> (1946) 72 CLR 409 at 417 (Latham CJ), 425 (Dixon J; Rich J agreeing).

<sup>13</sup> *The High Court and the Constitution* (5<sup>th</sup> ed) at 366; currently, Stellios, *Zines and Stellios's The High Court and the Constitution* (7<sup>th</sup> ed) at 448-9.

<sup>14</sup> *Friedmann*, "Public Welfare Offences, Statutory Duties and the Legal Status of the Crown" (1950) *Modern Law Review* 24; McNair, *Governmental and Intergovernmental Immunity in Australia and Canada* (1978) at 88-91; Hogg, *Liability of the Crown* (4<sup>th</sup> ed) at 441-2.

<sup>15</sup> *Victoria v CFMEU* (2013) 218 FCR 172 at [169]-[175] (Buchanan and Griffiths JJ; Kenny J agreeing).

<sup>16</sup> As to the difficulties in classification of statutory penalty provisions as "civil" or "criminal", see *Rich v ASIC* (2004) 220 CLR 129 at [32], [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ),



24. Be that as it may, even on the narrower case (AS [48]), as with all privileges and immunities of the Crown, “the Crown” means the body politic itself.<sup>17</sup> Accordingly, *Cain v Doyle* does not, *prima facie*, apply to a body corporate established by statute that has a separate legal existence,<sup>18</sup> especially one (like the Director) that is a “corporate Commonwealth entity” for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the **PGPA Act**): EPBC Act s 514U; PGPA Act ss 10–11.<sup>19</sup>
25. In *X v Australian Prudential Regulation Authority*, six members of the Court questioned, without deciding, whether a Commonwealth authority within the former  
10 *Commonwealth Authorities and Companies Act 1997* (Cth), the predecessor to the PGPA Act, has the character of “the Commonwealth” for the purpose of *Cain v Doyle*.<sup>20</sup> The answer should, *prima facie*, be “no”.
26. It is true that bodies corporate may sometimes be “the Commonwealth” or “the State”, for the purposes of constitutional provisions such as ss 75(iii)–(iv) and 114. However, whether an entity attracts the privileges and immunities of the Crown, is a different and narrower question than whether the entity is “the Commonwealth” (or a State) for constitutional purposes:<sup>21</sup> cf **J[44] CAB 59**.
27. It is, *or should be*, a starting point that any *Cain v Doyle* type interpretative  
20 presumption that penalty provisions do not apply to a body politic (the Crown) does not extend to a body corporate with a separate legal personality. This is because the

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[95], [108] (Kirby J); *Chief Executive Officer Customs v Labrador Liquor Wholesale* (2003) 216 CLR 161 at [114] (Hayne J).

<sup>17</sup> See eg *Hocking v Director-General, National Archives* (2020) 271 CLR 1 at [75]–[76] (Kiefel CJ, Bell, Gageler and Keane JJ), [213]–[214] (Edelman J).

<sup>18</sup> See eg Seddon, *Government Contracts: Federal, State and Local* (7<sup>th</sup> ed 2023) at 180-1. As noted below, legislation can expressly confer these privileges and immunities on a body corporate: *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 230 (the Court).

<sup>19</sup> See formerly, NPWC Act s 15A re the *Commonwealth Authorities and Companies Act 1997* (Cth). The provisions creating the Director as a corporation with perpetual succession, a common seal, capacity to sue and be sued in its corporate name, and power to hold real property, take a common form in Commonwealth Acts: EPBC Act s 514A, 514C, 514E; NPWC Act ss 15, 17; see e.g. the provisions for a Land Council in ss 22-23, 27 of the *Land Rights Act* and more generally the observations on the common form of such provisions in *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 141-3 (Stephen J).

<sup>20</sup> (2007) 226 CLR 630 at [14] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

<sup>21</sup> *State Bank (NSW)* (1992) 174 CLR 219 at 230 (the Court); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282 (McHugh and Gummow JJ); *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51 at [15] (Gleeson CJ, Gaudron, McHugh and Hayne JJ); also, Sawyer, “Shield of the Crown Revisited” (1957) 1 *Melbourne University Law Review* 137 at 149-50.



relevant inquiry is whether the provisions so apply to acts done by, or property held by, the body politic in question.<sup>22</sup>

28. If Parliament means to confer some or all of the privileges and immunities of the Crown on a statutory body corporate, it is not difficult for Parliament to say so in express terms in the constating (or other) legislation.<sup>23</sup> That may be achieved by provision that the body corporate is not subject to any obligation, liability or penalty that the relevant body politic itself is not subject.<sup>24</sup> Further, a body corporate might have (some of) the privileges and immunities of the Crown (body politic) where it is, in the strictest sense, a Department of State so as to be “indistinguishable” from such a Department, but that kind of case must be rare in modern times.<sup>25</sup>

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29. Here, there is no relevant extending provision, and any implication, if otherwise available, is inconsistent with the legislative scheme governing the Director’s function and powers with respect to a reserve within Aboriginal land.

#### **D. The claimed immunity arises in jointly managing a reserve on Aboriginal land**

##### The claim for immunity must be assessed by reference to the function concerned

30. The Director has claimed immunity from prosecution for the offence of carrying out work on a sacred site under s 34 of the *Sacred Sites Act* when performing its function to jointly manage a reserve leased on indigenous people’s land, in relation to which

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<sup>22</sup> *Bropho v Western Australia* (1990) 171 CLR 1 at 15-7 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Bass v Permanent Trustee Co* (1999) 198 CLR 334 at [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ). See also Sawyer, “Shield of the Crown Revisited” (1957) 1 *Melbourne University Law Review* 137 at 141 that “incorporation of an authority with liability to suit is *prima facie* sufficient to confer separate legal personality for all purposes and to exclude Crown privilege” but questioning if then recent authority stood in the way.

<sup>23</sup> *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 291 (Gibbs CJ); *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at [8] (Gleeson CJ), [26] (McHugh, Gummow and Heydon JJ), [65] (Hayne J). See, for example, *Interpretation Act 1987* (NSW), s 13A and *Interpretation of Legislation Act 1984* (Vic) s 46A that a statement that a State body “represents the Crown” means that body has the privileges and immunities of the Crown.

<sup>24</sup> For example, s 21 of the *Telecommunications Act 1975* (Cth) considered in *Telstra Corporation v Worthing* (1999) 197 CLR 61 at [8], [19]-[23] (the Court) and *Bowell v Australian Telecommunications Commission* (1982) 61 FLR 154 at 161-2 (Drummond J), the latter being cited in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 277 (McHugh and Gummow JJ).

<sup>25</sup> Cf *Repatriation Commission v Kirkland* (1923) 32 CLR 1 at 8 (Knox CJ and Starke J), considered in *Re Residential Tenancies Tribunal (NSW)*; *ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459 (McHugh J), 467 (Gummow J). In *Kirkland*, the Commission was responsible to the Minister for the general working of the Repatriation Department and the goods distrained were property of the Minister: *Australian Soldiers Repatriation Act 1920* (Cth) ss 7, 11; *Repatriation (Staff) Regulations 1920* (Cth) regs 4-7; *Australian Soldiers Repatriation Regulations 1920* (Cth) regs 107, 110.

there is an operative management plan, and when exercising its powers to hold real property and to carry out works in the performance of that function: **J[8]–[11], [64], [67] CAB 39, 74–7**; EPBC Act ss 514B(1)(a), (h), 514C(2)(b), (d).

31. The Full Court erred in failing to assess the claim for immunity by reference to the rights and obligations attaching to the performance and exercise of that function and those powers, and the rights and obligations attaching to the use of that property (the Gunlom Lease) by the Director:<sup>26</sup> cf **J[57], [69] CAB 69, 79**. That function, and those powers, are governed by the terms of ss 357, 362 and 367 of the EPBC Act (mentioned in [15]–[17] above). Those provisions inform the assessment of whether there is something in the statutory scheme that would displace the application of the penalty in the *Sacred Sites Act* to the Director’s use of land in the Territory.
32. As noted, ss 357 and 362 the EPBC Act require the Director to exercise its functions in accordance with the Lease and Plan, as the case may be, depending on whether a management plan is in operation, and any management plan must be consistent with the Lease: s 367. The obligations imposed on the Director by those instruments are inconsistent with any implication of immunity from prosecution under the *Sacred Sites Act* should the Director, in its use of the land, damage a sacred site. In that respect:
- 32.1. The Lease requires the Director to ensure the protection of sacred sites and to establish a protocol for conduct and access in relation to such places, including in relation to Sickness Country. The Director is not to permit public access nor carry out works in relation to sacred sites registered under the *Sacred Sites Act*<sup>27</sup> without the prior permission of the NLC, given after consultation with traditional Aboriginal owners, and who may also agree to the conditions of entry to Sickness Country being incorporated into an agreed plan of management: clauses 9(y), 25(4)–(7).<sup>28</sup>
- 32.2. The *Buladajang (Sickness Country) Access Protocols* made under clause 25(3) of the Lease require sacred sites to be managed in accordance with the *Sacred Sites Act* and that works be submitted for approval as appropriate to the Authority’s certificate process under that Act. Also, works in areas open to the

<sup>26</sup> *Townsville Hospitals Board* (1982) 149 CLR 282 at 288-92 (Gibbs CJ).

<sup>27</sup> Gunlom Falls is recorded rather than registered (Complaint at [4] **CAB 6**), but it is in the vicinity of registered sites and within Sickness Country: maps annexed to Lease and Protocols **IBFM 35, 48-9**.

<sup>28</sup> SC document 11 **IBFM 15, 28**.

public, such as Gunlom and Gimbat roads, will be conducted in accordance with the Kakadu Management Plan: clauses 7, 21.<sup>29</sup>

32.3. Part 9.5 of the Plan makes provision for assessing proposals that may have an impact on the park's cultural values and on Bininj/Mungguy peoples. An action that is likely to have more than a negligible impact on the park's values requires approval under the *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth). Capital works, as examples of actions considered likely to have impacts on cultural values and on Bininj/Mungguy peoples, require an authority certificate under the *Sacred Sites Act*: Table 4.<sup>30</sup>

10 32.4. The Plan is a legislative instrument prepared by the Director in conjunction with the majority indigenous reserve board: EPBC Act ss 368, 371.

33. These instruments, given operative force by ss 357, 362 and 367 of the EPBC Act, clearly indicate that there can be no implication that the Director, as a body corporate, is immune from the provisions of the *Sacred Sites Act* (including its penalty provisions) in the Director's use of the land concerned.

There is no other implication that the function engages immunity

34. The Full Court referred (at **J[56] CAB 68**) to various functions of the Director listed in s 514B(1) of the EPBC Act and reasoned (at **J[57] CAB 69**) that:

20 These are intrinsically executive governmental functions directed to the stewardship and management of Commonwealth places, and, in relation to one of those functions, the maintenance of international relationships as a national polity. In discharging those functions the Director is clearly to pursue the national or public interest, and to follow policies determined by the executive government. While it is no doubt correct to say that the Director exercises statutory powers rather than an executive authority conferred directly by s 61 of the Constitution, that statutory authority is conferred in exercise of the Commonwealth's nationhood power and the Director's function involves the execution and maintenance of the laws of the Commonwealth. The incorporation of the Director is a convenient device by which the executive government can exercise powers for the performance of those functions, including the entry into property dealings and other contracts with non-government parties.  
30 [footnoting s 514C(2)]

There are several errors in this path.

35. *First*, the relevant function that gives rise to the contested claim for immunity from prosecution is the function to manage a reserve, in this case, a reserve leased on

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<sup>29</sup> SC document 12 **IBFM 44, 46.**

<sup>30</sup> SC document 13 **IBFM 212.**

indigenous people’s land that is to be managed in conjunction with a majority indigenous reserve board. Other functions, such as cooperation or research with other agencies, drawn into the Full Court’s characterisation of “intrinsically executive governmental functions”, are irrelevant to the claim: cf **J[56]–[57] CAB 68–9**.

36. *Second*, in relation to the relevant function in issue, there is an area of “legal autonomy”<sup>31</sup> within the Act because the Minister’s general power of direction is constrained, if not displaced, in respect of a reserve that is the subject of a lease and management plan such as Kakadu. Section 514D(1) provides that:

10           The Director must perform the Director’s functions and exercise the Director’s powers in accordance with any directions given by the Minister, unless the Act provides otherwise. [emphasis added]

Sections 357 and 362, in requiring the Director to perform its functions in accordance with the Lease and Plan, are within the proviso to s 514D(1). The contrary view at **J[62] CAB 73** referring to approval of a management plan by the Minister overlooks the circumstances that a plan, once made, is a legislative instrument (s 372), and that activities done in a Commonwealth reserve in contravention of a management plan, including by the Director, are the subject of civil and criminal penalties (ss 354–354A).

37. *Third*, the case that the Director does not have any immunities or privileges of the Crown when managing a reserve under a management plan is reinforced by s 354A of the EPBC Act, which contains heritage offences in relation to activities done other than in accordance with an operative management plan: s 354A(1), (3), (8); *heritage value* is defined to include social significance and apt to include sacred sites: s 528. Criminal liability may therefore attach to the Director under the EPBC Act. The defence in s 354A(11) where the Director acts in accordance with a direction of the Minister under s 385 does not apply because, by the terms of s 385, that power of direction does not apply if there is an operative management plan.<sup>32</sup> This underscores the area of legal autonomy from Ministerial direction when a management plan is in force. The Full Court considered the provisions irrelevant as not speaking to offences prescribed by Territory laws: **J[66] CAB 76**. However, these provisions acknowledge,
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<sup>31</sup> Borrowing from *State Government Insurance Corporation v Government Insurance Office (NSW)* (1991) 28 FCR 511 at 557 (French J).

<sup>32</sup> Separately, the defence in s 354A(10) of taking action when there is not an operative management plan for certain preservative purposes does not apply to an action in Kakadu: s 354A(10)(b).

in the Commonwealth law constituting the Director that, as a body corporate, the Director is not immune from criminal suit when managing a reserve.

38. *Fourth*, the Gunlom Lease held by the Director is not property of the Commonwealth, and Gunlom is certainly not a “Commonwealth place”: cf **J[57] CAB 69**. In *Newcrest Mining v Commonwealth*,<sup>33</sup> the proclamation of Stage III of Kakadu and its vesting in the Director under s 7(7) of the NPWC Act resulted in the Director acquiring the land freed of the right of the company holding mineral leases to conduct mining on the land, and in the Commonwealth separately acquiring reserved sub-surface minerals freed from the right of the company to recover minerals. This is not some mere “vehicle” or “convenient device”: cf **J[55], [57] CAB 67–9**. Each entity held rights to property distinct from the other:<sup>34</sup> see further Part IVE.

**E. The claimed immunity arises in holding a lease of Aboriginal land**

Reciprocal Territory criminal laws apply to Aboriginal land leased to the Director

39. Section 8(2)(a) of the EPBC Act declares that that Act does not affect the operation of the *Land Rights Act*. That includes the grant of reciprocal Territory legislative power by s 73 for the enactment of the *Sacred Sites Act* and the general application of Territory laws, including criminal laws, to Aboriginal land by s 74. Section 8(2)(a) of the EPBC Act preserves the application of those Territory laws in relation to Aboriginal land leased to the Director for the purposes of Part 15 Division 4.
40. The grant of legislative power in s 73(1) of the *Land Rights Act*, titled *Reciprocal legislation of the Northern Territory*, provides, relevantly, that:

The power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* in relation to the making of laws extends to the making of:

- (a) laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorising the entry of persons on those sites, ...

...

but any such law has effect to the extent only that it is capable of operating concurrently with the laws of the Commonwealth, and, in particular, with this Act, Division 4 of Part 15 of the *Environment Protection and Biodiversity Conservation*

<sup>33</sup> (1997) 190 CLR 513 at 634-5 (Gummow J; Toohey and Gaudron JJ agreeing at 560-1).

<sup>34</sup> Compare *Hocking* (2020) 271 CLR 1 at [75]-[76] (Kiefel CJ, Bell, Gageler and Keane JJ), [225]-[227] (Edelman J).

*Act 1999* and any regulations made, schemes or programs formulated or things done, under this Act, or under or for the purposes of that Division.

Section 74(1) further provides that the *Land Rights Act*:

... does not affect the application to Aboriginal land of a law of the Northern Territory to the extent it is capable of operating concurrently.

Section 74 was amended in 2021<sup>35</sup> to add, in s 74(2)(b), that “without limiting” s 74(1), that Act does not affect the application to Aboriginal land of Territory laws providing for offences similar to what is provided in the Act.

41. In that connection, s 69 of the *Land Rights Act* itself prescribes an offence where a person enters or remains on land in the Northern Territory, including Aboriginal land, that is a sacred site. It is a defence, however, if the person is acting in accordance with a law of a Territory (s 69(2)), made in accordance with s 73(1)(a), for example, if done in accordance with a certificate issued under the *Sacred Sites Act*.
42. The effect of ss 73 and 74 is to clear the field for the Northern Territory to enact laws protecting sacred sites on Aboriginal land, provided that such laws do not alter or detract from Commonwealth laws, specifically, the *Land Rights Act* and Part 15 Division 4 of the EPBC Act.<sup>36</sup>
43. Sections 73 and 74 plainly capture the application of the *Sacred Sites Act* to Aboriginal land and, consistent with s 69, that includes the application of penalties under Territory law for interference with sacred sites. There is no reason why there should be any disapplication of the Territory law when an area of Aboriginal land is, as required by s 12(2B)–(2C), leased to the Director for the purposes of the EPBC Act.
44. With the backdrop of the territories power in s 122 of the Constitution, ss 73 and 74 of the *Land Rights Act* demonstrate that there is no need to resort to any *Cain v Doyle* type presumption to ascertain the reach of Territory law in connection with the Director’s use of Aboriginal land: cf **J[69]–[71] CAB 79–80**. The question is simply whether the Territory law made under s 73 has a concurrent operation with the Commonwealth scheme, as may be the case with the EPBC Act and the *Sacred Sites Act* both providing for offences in relation to works that may damage heritage (EPBC

<sup>35</sup> *Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Act 2021* (Cth) s 3 Schedule 3 Part 3 item 35.

<sup>36</sup> *R v Kearney; ex parte Japanangka* (1984) 158 CLR 394 at 418-9 (Brennan J); *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at [88] (Bell J), [108]-[109] (Gageler J), [143]-[144] (Edelman J).

Act s 354A) or sacred sites (*Sacred Sites Act* s 34). Ironically, on the second question of legislative power (which is no longer in issue), the Full Court observed (correctly) that the *Sacred Sites Act* does not alter or deny the functions of the Director in regulating the Director's activities in relation to sacred sites as it regulates the same activities on the part of others: **J [89] CAB 93**.

The Director does not hold interests in Aboriginal land for the Commonwealth

45. The *Land Rights Act*, which provides for significant areas of Aboriginal land to be leased to the Director for the purposes of Part 15 Division 4 of the EPBC Act (s 12(2B)–(2C)), and formerly, for the purposes of the NPWC Act, proceeds on the basis that the Director is not the Crown in right of the Commonwealth. The relevant features are as follows:

45.1. Where a person other than the Crown holds an estate or interest in Crown land, the land is, in general, unavailable for claim, and is unable to be granted as Aboriginal land unless the outstanding estate or interest is brought to an end: ss 10(2), 11(1)(e), 12(1)(b), (4)(b), 50(1); s 3(1) definitions of *alienated Crown land* and *unalienated Crown land*.

45.2. A reference in the *Land Rights Act* to *the Crown* is a reference to the Crown in right of the Commonwealth or of the Northern Territory, as the case requires, and the Act binds the Crown in right of the Commonwealth or of the Northern Territory. Following self-government, the application of the Act in relation to *Crown land* extends to Crown land vested in the Northern Territory, as well as Crown land vested in the Commonwealth held back under ss 69–70 of the *Northern Territory (Self-Government) Act 1978* (Cth): ss 3(6), 3A–3B.<sup>37</sup>

45.3. Section 10(4) of the *Land Rights Act* provides that any estate or interest held by the Director in lands in Kakadu “is taken to be an estate or interest held by the Crown in right of the Commonwealth.” Section 12(2A) provides that where a deed of grant relating to land in a Commonwealth reserve under the EPBC Act takes effect, any interest held by the Director before that time ceases to exist.

45.4. The current form of s 10(4) was inserted in 2019<sup>38</sup> and replaced like provisions first introduced in 1978 following enactment of the NPWC Act and

<sup>37</sup> The legislative history is recounted in *Japanangka* (1984) 158 CLR 394 at 417 (Brennan J).

<sup>38</sup> *Aboriginal Land Rights (Northern Territory) Amendment Act 2019* (Cth) s 3 Schedule 1 item 2.



recommendations of the *Ranger Commission*,<sup>39</sup> deeming lands vested in the Director to be unalienated Crown land to enable a traditional land claim and subsequent grant as if they were lands held by the Crown, with provision for the negotiation of leaseback agreements (ss 12A–12C).<sup>40</sup>

46. The deeming (legal fiction) that an interest in land held by the Director is taken to be held by the Crown in right of the Commonwealth, so as to enable the claiming and grant of land vested in the Director, overcomes the true contrary legal position effected by the NPWC Act, continued by the EPBC Act, that the Director is not the Crown in right of the Commonwealth and that it holds no interest in relation to Aboriginal land for or on behalf of that body politic.<sup>41</sup>
47. The scheme is explained concisely in the Explanatory Memorandum for the amendments inserting current s 10(4) into the *Land Rights Act* where it was observed that for parcels in Kakadu not yet granted and leased under the Act:<sup>42</sup>

The Director is a corporation sole with perpetual succession created by section 15 of the *National Parks and Wildlife Conservation Act 1975* (Cth) (repealed), and continued in existence by section 514A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Accordingly, the Director is a separate legal person to the Commonwealth.

‘Crown Land’ is defined in subsection 3(1) of the *Land Rights Act* as land in the Northern Territory that has not been alienated from the Crown by a grant of an estate in fee simple in the land, or land that has been so alienated but has been resumed by, or has reverted to or been acquired by, the Crown.

Because the Director is not the Crown for the purposes of the *Land Rights Act*, the four parcels of the Kakadu Land that the Director currently owns would be land in respect of which a person (other than the Crown) has an estate or interest for the purposes of section 10 of the *Land Rights Act*. As such, without amendment to the *Land Rights Act*, those parcels would only be able to be granted in escrow, pending the Director’s interests coming to an end.

New subsection 10(4) allows a deed of grant for the Kakadu Land to be delivered and to take effect despite the interests of the Director. [emphasis added]

<sup>39</sup> *Ranger Uranium Environmental Inquiry Second Report* (Fox J with Commissioners Kelleher and Kerr: 1977) chapters 14-15, 18. It was, to that extent, the first report on a land claim, being required by former s 11(2) as if it were an inquiry under s 50; see also Aboriginal Land Commissioner, *Alligator Rivers Stage II Land Claim* (Toohey J: 1981) at [240]-[259].

<sup>40</sup> *Aboriginal Land Rights (Northern Territory) Amendment Act 1978* (Cth) ss 3, 6-9, 14, and amended by the *Aboriginal Land Rights (Northern Territory) Amendment Act (No.2) 1987* (Cth) ss 3-5, 13.

<sup>41</sup> Compare the contention concerning the operation of the *Land Rights Act* in *Japanangka* (1984) 158 CLR 394 upon the alienation of Crown land by the Territory to the Northern Territory Land Corporation and Conservation Land Corporation.

<sup>42</sup> *Explanatory Memorandum Aboriginal Land Rights (Northern Territory) Amendment Bill 2017* p.3.

48. Section 352 of the EPBC Act confirms that the Director’s rights in a Commonwealth reserve within Aboriginal land held under lease (such as Kakadu) are not interests held by or for the Commonwealth. Ordinarily, when land ceases to be part of a Commonwealth reserve, the Director’s usage right relating to that land vests in the Commonwealth: s 352(2). However, if the usage right is a lease of indigenous people’s land (as here), the usage right ceases to exist: s 352(3): cf **J[55] CAB 68** overlooking sub-s (3). Similar provision was made in s 7(10)–(10A) of the NPWC Act.
49. Finally, the legislative history to the enactment of the EPBC Act confirms that the leasing of Aboriginal land by the Director is not some mere “vehicle” for the Commonwealth to deal with interests in land within Commonwealth reserves: cf **J[55], [57] CAB 67–9**.
- 49.1. The initial proposal under the *Environmental Protection and Biodiversity Conservation Bill 1998* (Cth) was that reserves would be managed by the Secretary of the Department (Part 15 Division 4), with provision in the *Environmental Reform (Consequential Provisions) Bill 1998* (Schedule 4 items 1, 8(2)) for the continuation of parks under the NPWC act as reserves and for the transfer of the Director’s interest in the park leases to the Commonwealth.
- 49.2. The proposals were opposed by the Land Councils, who considered the transfer to be in breach of the Kakadu and Uluru leases: Senate Standing Committee on Environment and Communications, *Report on Environment Protection and Biodiversity Conservation Bill 1998 & Environmental Reform (Consequential Provisions) Bill 1998* (27 April 1999) at [10.5]–[10.15].
- 49.3. In that respect, the leases provide that any enactment of any Act that is inconsistent with the leases or “substantially determinantal to the interests” of the Land Trusts and relevant Aboriginals, defined to include any actual or proposed transfer, shall be deemed a breach of a fundamental term of the leases entitling termination: see Gunlom Lease clause 12(1), (7) **IBFM 19**.
- 49.4. Following that objection by the Land Councils, the proposals were withdrawn, and amendments made to “[p]rovide increased recognition of the important role of indigenous peoples in ... jointly managed Commonwealth reserves”, with the

office of the Director “retained at the request of traditional owners”.<sup>43</sup> This became Part 19 Division 5 of the EPBC Act dealing with the office of the Director, with consequential amendments to Division 4 dealing with reserves.

The amendments to the Bill continuing the office of the Director, as a body corporate, were accompanied by amendment to clause 4 to clarify that corporate entities are not immune from criminal prosecution: see AS [54] and *Supplementary Explanatory Memorandum Environmental Protection and Biodiversity Conservation Bill 1998* (Cth) at [4]–[5], [198], [232].

The Full Court’s decision results in legislative incoherence

- 10 50. The Full Court adverted to the submission by the Aboriginal parties on the need for “rational integration” of the statutory scheme, but did so in the context of whether the penalty in s 34 of the *Sacred Sites Act* attaches to the Commonwealth as a body politic: **J[79] CAB 75**. That question, however, only arises if the Director has the character of the Commonwealth for that purpose when jointly managing a reserve on Aboriginal land leased under the *Land Rights Act*. The “rational integration” submission went to that anterior question.
51. The Full Court’s decision that the Director is not liable to prosecution under a Territory law dealing with the protection of sacred sites on Aboriginal land enacted in accordance with s 73(1)(a), and forming part of the laws of the Territory that apply to  
20 Aboriginal land under s 74, introduces legislative incoherence, given the like offence provision in s 69 and the legislative premise to the grant and leaseback of Aboriginal land that the Director is not the Crown in right of the Commonwealth.

**Part V: Time estimate**

52. The Aboriginal parties estimate approximately 30 minutes for oral argument.

**Dated: 26 July 2023**



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<sup>43</sup> Second Reading, Parliamentary Secretary to the Minister for the Environment and Heritage, *Environment Protection and Biodiversity Conservation Bill 1999*, House of Representatives, Hansard 29 June 1999 at 7769.

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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**ANNEXURE TO THE PROPOSED INTERVENERS' SUBMISSIONS**

Pursuant to para 3 of the *Practice Direction No 1 of 2019*, the proposed Interveners set out below a list of the constitutional provisions, statutes, and statutory instruments referred to in these submissions.

| No                                      | Description  | Version                       | Provisions  |
|---|--|-------------------------------|---|
| <b><i>Constitutional provisions</i></b> |  |                               |   |
| 1.                                      | Constitution   | current                       | ss 75, 114, 122   |
| <b><i>Statutory provisions</i></b>      |  |                               |   |
| 2.                                      | <i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>                                  | Compilation at 13 March 2019  | ss 3–3B, 4-5, 10(2) (4), 11(1)(e), 12(1)(b) (2B) (2C) (4)(b), 12A–12C, 19, 23–23, 27, 50, 69, 73–74 |
| 3.                                      | <i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>                                  | Reprint No 4<br>30 April 1995 | ss 3, 10(4), 11(1A), 12(2B), (2C), (2D) 50(1A)-(1B)   |
| 4.                                      | <i>Aboriginal Land Rights (Northern Territory) Amendment Act 1978 (Cth)</i>                        | As made                       | ss 3, 6–9, 14   |
| 5.                                      | <i>Aboriginal Land Rights (Northern Territory) Amendment Act (No 2) 1987 (Cth)</i>                 | As made                       | ss 3-5, 13  |
| 6.                                      | <i>Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Act 2021 (Cth)</i> | As made                       | s 3 Schedule 3 Part 3 item 35   |

|     |   |  |  |
|-----|---|--|--|
| 7.  | <i>Australian Soldiers Repatriation Act 1920 (Cth)</i>                      | As made  | ss 7, 11   |
| 8.  | <i>Australian Soldiers Repatriation Regulations 1920 (Cth)</i>              | As made  | regs 107, 110  |
| 9.  | <i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i>  | Compilation at 29 October 2018                     | ss 8(2)(a), Part 15 Division 4, ss 352(3), 354A, 357(1)(b), (2)(b), 361, 362(1)-(2), 363(3)-(5), 367(1)(d), 368, 374, 384-390, Pt 19 Div 5, ss 514A, 514B(1)(a), 514C, 514E, 514U, 528 |
| 10. | <i>Environment Protection and Biodiversity Conservation Bill 1998 (Cth)</i> | As presented and read the first time in the Senate | Part 15, Division 4  |
| 11. | <i>Environmental Reform (Consequential Provisions) Act 1999 (Cth)</i>       | As made  | Schedule 4, items 3-4, 23-37   |
| 12. | <i>Environmental Reform (Consequential Provisions) Bill 1998 (Cth)</i>      | As presented and read the first time in the Senate | Schedule 4, items 1, 8(2)  |
| 13. | <i>Interpretation Act 1978 (NT)</i>   | As in force at 18 February 2019                    | s 17   |
| 14. | <i>Interpretation Act 1987 (NSW)</i>  | current  | s 13A  |
| 15. | <i>Interpretation of Legislation Act 1984 (Vic)</i>                         | current  | s 46A  |
| 16. | <i>National Parks and Wildlife Conservation Act 1975 (Cth)</i>              | Consolidated at 22 June 1999                       | ss 7, 15, 15A, 17  |
| 17. | <i>Northern Territory Aboriginal Sacred Sites Act 1987 (NT)</i>             | current  | ss 4, 19B, 19F, 25, 27-29, 34  |
| 18. | <i>Public Governance, Performance and Accountability Act 2013 (Cth)</i>     | current  | ss 10-11   |
| 19. | <i>Re-establishment and Employment Act 1945 (Cth)</i>                       | As in force at 10 May 1946                         |  |
| 20. | <i>Repatriation (Staff) Regulations 1920 (Cth)</i>                          | As made  | regs 4-7   |

|     |   |                                 |      |
|-----|---|---------------------------------|------|
| 21. | <i>Telecommunications Act 1975</i><br>(Cth) | Reprinted at<br>31 January 1987 | s 21 |
|-----|---|---------------------------------|------|