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

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and

DIRECTOR OF NATIONAL PARKS (ABN 13 051 694 963)

First Respondent

and

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

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APPELLANT'S REPLY

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: REPLY

2. ***Invalid Syllogism.*** It is common ground that s 34(1) of the Sacred Sites Act does not expose the Commonwealth to a penalty because the Commonwealth is a "body politic": **AS [16]** and **RS [8]**. Upon that consensus, the Attorney-General erects a syllogism. The major premise is that "body politic" here means the "broader conception of the Crown", relevantly including "the special category of statutory corporations having the status of the body politic": **RS [13], [2], [6], [9], [23], [27]**. The minor premise is that the DNP is intended by the Commonwealth Parliament to fall within this "special category": **RS [7], [35]-[51]**. The conclusion is that s 34(1) does not bind the DNP.

3. The syllogism is invalid at every level. The major premise is false because the term "body politic" does not have the idiosyncratic meaning attributed to it. It has its usual meaning, recently restated by six judges in *Hocking*: it describes the Commonwealth as "a distinct legal entity".[1] This is not some "narrow" meaning of the term: cf., **RS [9]**. It is the established and only relevant meaning: "body politic" is used in the Interpretation Act to contrast "body corporate": s 17. The Sacred Sites Act uses the term in the same way, which is precisely why s 4(4) expands the definition for the intra-mural purpose which it serves. The minor premise is also false: see **[12]-[13]** below. The conclusion would not follow even if the premises were correct, because a Territory law may, and here does, impose liability on Commonwealth entities but not on the Commonwealth itself.[2] Section 4(3) confirms this: see **[5]-[6]** below.

4. If adopted by this Court, one strange feature of the syllogism would need to be confronted. The syllogism posits a different application for natural persons compared to statutory corporations. The Attorney accepts that natural persons forming part of the executive government are bound by criminal norms of general application, "even in the performance of their official functions": **RS [51]**.[3] Thus, only statutory corporations fall within the "special category" that can share the body politic's presumptive

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1 *Hocking* (2020) 271 CLR 1, [75]-[76] (Kiefel CJ, Bell, Gageler and Keane JJ), [126] (Nettle J), [213] (Edelman J). See also *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, [2] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ).

2 See, by analogy, *Telstra* (1999) 197 CLR 61, [17]-[18] and [23]-[25] (the Court).

3 *Wurridjal* (2009) 237 CLR 309, [164]-[165] (Gummow and Hayne JJ); *Jacobsen* (1995) 182 CLR 572, 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

immunity.[4] This is impossible to justify. Indeed, it falsifies what is said to be the "determinative question" (cf., **RS [35], [9]**) – i.e., whether the body is intended to have the same status *as the executive government*. Natural persons are bound even if they are at apex of the executive; whilst statutory corporations may not be bound even though they are not part of the executive.[5] Moreover, the practical implications would be: on one hand, functionally to encourage prosecution of individuals rather than the entity in whose name they acted; whilst, on the other hand, making uncertain whether a statutory corporation is bound by local laws (since this may turn on fine-grained implication).

5. ***Section 4:*** The Attorney contends that a "negative implication" arises from the 2005 amendments to s 4: **RS [13]-[18]**. It is necessary to put those amendments into context. Prior to 2005, s 4 comprised only what is now s 4(1). At that time, no negative implication of the kind suggested could have existed. Section 4(1) was regarded as sufficient to impose criminal liability on "officers, employees and agents". So much is clear from s 4(3), which provided that the ("existing"[6]) liability of "officers, employees and agents" was not affected by the 2005 amendments. *Cain v Doyle* aside, it must be the Attorney's case that s 4 was then amended impliedly to immunise Commonwealth statutory corporations from the application of ss 33-35 of the Act by way of the "negative implication". That jars with the plain intention of those amendments – to *expand* government accountability[7] – and has no basis in the extrinsic material. That material shows only an intention to *retain* the pre-existing position vis-à-vis the Commonwealth (i.e., that *it* is not bound) and its "agents" (who *are* bound).

6. The meaning of "agent" in s 4(3) assumes central importance to the Attorney's construction. Only by confining "agent" to natural persons can the suggested negative implication be sustained. But to confine it that way is unwarranted.[8] "Agent" has long been the "proper word[] of description"[9] for corporations associated with the Crown. Its use in *Bropho* confirms this: the Corporation was an "agent" of the Crown.[10]

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4 This is an awkward dichotomy for the DNP, which is a corporation sole *constituted* by a natural person: EPBC Act, ss 514A, 514E(1)(a) and 514F; see *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521, 534 (Dixon, Williams, Fullagar and Kitto JJ).

5 See authorities cited at **AS fn 95**.

6 Legislative Assembly, *Debates*, 20 October 2005, p. 1062-1063.

7 Legislative Assembly, *Debates*, 1 December 2005, p. 1351.

8 See, by analogy, *Mason Bros (Mesco) Ltd v AGF Transport Ltd* [1969] NZLR 1, 4 (Perry J), approved in *Garnett v Qantas Airways Ltd* (2021) 57 WAR 290, [186]-[192], [224], [251] (the Court).

9 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 382 and also 383 388 (Williams, Webb and Taylor JJ) and 393-4, 396-7, 400-1 (Kitto J, Fullagar J agreeing); *McNamara* (2005) 221 CLR 646, [35] (McHugh, Gummow and Heydon JJ, Gleeson CJ agreeing) and [66] (Hayne J).

10 *Bropho* (1990) 171 CLR 1, 11 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), referring to *Western Australian Development Corporation Act 1983* (WA), s 4(3).

7. ***Cain v Doyle:*** The Attorney defends *Cain v Doyle* on the four bases summarised at **RS [33]**. ***First***, the Attorney submits that this Court has "repeatedly restated" *Cain v Doyle* "without qualification or the expression of any doubt".[11] None of the cases cited by the Attorney involved argument about the present issue.[12] There was no majority in favour of the presumption in *Cain v Doyle*[13] itself, and cases since then have mostly confined the presumption to the Commonwealth as body politic: **AS [45]**. That *Cain v Doyle* has "stood for more than 75 years" (**RS [27]**) simply reflects that, for whatever reason, it has very rarely arisen for decision and almost never in the present context.

8. ***Second***, the Attorney submits that "legislative bodies are aware of and have for decades framed legislation in reliance on the presumption": **RS [33]**. In support of this submission, the Attorney cites a Commonwealth drafting guideline (dated September 2011), dealing with the framing of Commonwealth criminal offences.[14] Although this material cannot sustain sweeping assertions about what "all Australian Parliaments have relied upon" for "many decades" (**RS [27]**), it does indicate why the Attorney's submissions about the EPBC Act should not be accepted. The 2011 guideline relevantly states that: "*Generally, if the legislation establishing the [Commonwealth statutory] authority does not expressly provide immunity, immunity will not readily be implied by courts*."[15] This is consistent with Drafting Direction No 3.6,[16] which the Attorney does not cite, but which is the more relevant guideline because it deals with conferral of "Crown immunity" on Commonwealth bodies. Drafting Direction No 3.6 states (at [288]) that: (a) a draftsperson "must" specify whether or not corporate statutory bodies are entitled to the privileges and immunities of the Crown; (b) "generally speaking", they should not be so entitled; and (c) "[s]pecific policy authority is required for departures from this general approach". There is therefore no basis to submit that

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11 **RS [33]** in **fn 38** refers to the cases cited in **fn 28**.

12 Eg in *X v APRA* (2007) 226 CLR 630, [14], the Court said there "may be a question", but noted that *Cain v Doyle* was not "put in issue" and "may be placed to one side". *SASB* (1996) 189 CLR 253 does not assist the DNP: cf., **RS [23]**. The majority did not decide whether the Board was entitled to the presumption in *Cain v Doyle* (at 270); the legislation constituting the Board provided that it was a statutory body "representing the Crown" (at 264), which influenced the minority's conclusion that the Board was the State (at 284, 292-4); and it was conceded that the penal provision should be read down (at 262).

13 Only Dixon J (Rich J agreeing) applied the presumption: 424-6. Latham CJ reached the same result, but by the broader proposition that the Crown *cannot* be criminally liable: 417-419. Starke and Williams JJ saw no reason why the Crown could not be criminally liable and considered the statute achieved that end. The holding was *obiter* and re-opening is thus strictly unnecessary: *Vunilagi v The Queen* [2023] HCA 24, [155] (Edelman J); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, [56] (Kirby J).

14 Commonwealth Drafting Direction No. 3.5 (dated 17 June 2020) at [1] requires draftspersons to have regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition), albeit the Guide is "neither binding nor conclusive".

15 *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, [2.4.3] p.34.

16 *Drafting Direction No. 3.6: Commonwealth bodies*, version 3.4, 10 January 2023, [287]-[288].

Australian "legislative bodies" have adopted a view of *Cain v Doyle* which would be of adequate width to enable the Attorney to succeed in this proceeding.

9. These materials also confirm that to uphold AAPA's contentions would not involve any change to a "working hypothesis", so as to commend what would otherwise amount to "prospective overruling": cf., **RS [34]**. It would merely confirm what the drafting guidelines already recognise: immunity will not readily be implied by courts.

10. ***Third***, the Attorney submits that "the presumption may be rebutted when a contrary intention is clearly demonstrated": **RS [33]**. This depends upon an anterior debate, as to whether *Cain v Doyle* operates as a "rigid rule of law" or "a rebuttable presumption": **RS [30]**. In the way it has developed, that debate risks sterility. Although he denies that *Cain v Doyle* is a "rule", the Attorney accepts that "clear expression" or "quite certain indications"[17] are required to displace the so-called "presumption". This is materially indistinguishable from the "express mention or necessary implication" test described as a "rule" by the Court in *Bropho*.[18] Indeed, the Attorney defends the Full Court's search for a "necessary implication… to impose criminal liability": **RS [20]**. Whether one calls it a "rule" or the "strongest presumption", it must be reconciled with contemporary constitutional theory and statutory construction: cf., **RS [30]**.

11. ***Fourth***, the Attorney submits that *Cain v Doyle* promotes "federal comity and democratic accountability": **RS [31], [33]**. It does so only when restricted to the body politic itself. *Cain v Doyle* does not promote those values when applied for the benefit of statutory corporations engaged in commercial activities like building a walking track for tourists. That it undermines those values is revealed by the present dispute, which concerns criminal norms applying to all persons interacting with Aboriginal sacred sites situated on land within the Territory. Comity and democratic accountability are not promoted by a rule which assumes that statutory corporations of other polities can disregard local laws whilst carrying out work within the Territory. Those values are better promoted by adopting equality before the law as the relevant starting point. This would accord with the reasoning in *Bropho*: **AS [36]-[45]**.

12. ***Status of the DNP:*** Lastly, the DNP does not fall within any "special category". ***First***, the Attorney propounds the wrong test. *SFIT* did not concern presumptive immunities. Instead, it concerned the scope of s 114 of the *Constitution* and an express statutory

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17 Ibid.

18 *Jacobsen* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Bropho* (1990) 171 CLR 1, 16 and 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

immunity for "the Crown", which were analysed together.[19] Tests derived from Ch III and Ch IV of the *Constitution* should not be adopted in this field (cf., **RS [35]-[40]; J [44]-[49] CAB 58-64** compare **AS [52]**) because they produce distorted outcomes: see **[13]** below. In this field, this Court has repeatedly recognised that the question whether a statutory corporation enjoys the privileges and immunities of the Commonwealth is different and narrower.[20] Incorporation, without express immunity, is a powerful contra-indicator of immunity: cf., **RS [37], [41]**; compare **AS [40]**.

13. ***Second***, the EPBC Act contains clear evidence that there is to be no criminal immunity for the DNP. The starting point is that the DNP is a corporation sole, which is amenable to suit (s 514A), and which was not expressly granted any immunity from civil or criminal laws[21] (indeed, the Commonwealth Parliament was careful to "*avoid* any appearance" that Crown immunity extended to corporate entities: **AS [54]**. The functions of the DNP include the protection and conservation of heritage in Commonwealth reserves (s 514B(1)(b)), and it has power to make contracts and carry on works (s 514C(2)(a)-(b)) including (relevantly) without Ministerial approval where the value is less than $1,000,000: s 514D(5)(a). Subject to some defences, the DNP is exposed to Commonwealth criminal offences should it exercise that power in a manner which results in damage to heritage in Commonwealth reserves: s 354A(1)(c)(ii). Already, the DNP is exposed to criminal offences by the EPBC Act to which the Commonwealth as a body politic is not exposed - it is plainly outside the "body politic": cf., **RS [7], [9], [19]**. Further, the DNP is required by legislation to comply with the management plan in operation for a Commonwealth reserve (s 362(1)), and the plan in question states that an "Authority Certificate from the AAPA under the [Sacred Sites Act] is required where the action has potential impact upon a sacred site": **IBFM 212**.

Dated: 28 August 2023

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19 *SFIT* (1979) 145 CLR 330, 339 (Stephen J) and 359 (Aickin J).

20 *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219, 230-231 (the Court); *SGH Ltd* (2002) 210 CLR 51, [15] and [45] (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

21 Except that the DNP is specifically exempted from Commonwealth, State and Territory taxation: s 514W. The Attorney is wrong to rely upon this exemption: **RS [14]**. It shows that Parliament adverted to, and expressly conferred, exemptions where it intended to do so. There is no exemption for other laws and no basis in s 514W to imply any broader exemption.