HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

CHIEF EXECUTIVE OFFICER, ABORIGINAL AREAS PROTECTION AUTHORITY APPELLANT

AND

DIRECTOR OF NATIONAL PARKS & ANOR RESPONDENTS

Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks
[2024] HCA 16
Date of Hearing: 12 & 13 December 2023
Date of Judgment: 8 May 2024
D3/2023

ORDER

1. *Appeal allowed.*

2. *Set aside order 1 of the orders of the Full Court of the Supreme Court of the Northern Territory made on 30 September 2022 and, in its place, order that the question referred to the Full Court be answered as follows: "The offence and penalty prescribed by s 34(1) of the* Northern Territory Aboriginal Sacred Sites Act 1989 *(NT) apply to the Director of National Parks as a matter of statutory construction."*

On appeal from the Supreme Court of the Northern Territory

Representation

J T Gleeson SC with S H Hartford Davis and L S Peattie for the appellant (instructed by Hutton McCarthy)

Submitting appearance for the first respondent

S P Donaghue KC, Solicitor-General of the Commonwealth, and B K Lim with A R Sapienza for the second respondent (instructed by Australian Government Solicitor)

S A Glacken KC with G A Hill SC for the Northern Land Council, the Gunlom Aboriginal Land Trust, and Joseph and Billy Markham, intervening (instructed by Northern Land Council)

CATCHWORDS

Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks

Statutes – Construction – Presumptions – Imposition of criminal liability – Where Director of National Parks ("DNP") engaged contractor to perform construction works within "sacred site" under *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("Sacred Sites Act") – Where works undertaken without permission of "Authority Certificate" or "Minister's Certificate" under Sacred Sites Act – Where s 34(1) of Sacred Sites Act prohibits "[a] person" from carrying out work on or using sacred site and specifies criminal penalties for breach – Where DNP a body corporate pursuant to *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – Where s 17 of *Interpretation Act 1978* (NT) defines "person" to include body politic and body corporate – Where appellant charged DNP with offence against s 34(1) – Whether DNP can be criminally liable for breach of s 34(1) – Whether DNP entitled to benefit of presumption stated in *Cain v Doyle* (1946) 72 CLR 409 against imposition of criminal liability "upon the Crown" – Whether presumption stated in *Cain v Doyle* confined to presumption against construing statute to impose criminal liability on body politic.

Words and phrases – "bind the Crown", "body corporate", "body politic", "criminal liability", "Crown in right of", "person", "presumption", "privileges of the Crown", "sacred site", "statutory corporation".

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 3(1).
Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 514A, 514B, 514E.
National Parks and Wildlife Conservation Act 1975 (Cth), s 15.
Interpretation Act 1978 (NT), ss 17, 24AA.
Northern Territory Aboriginal Sacred Sites Act 1989 (NT), ss 3, 4, 34(1).

1 GAGELER CJ AND BEECH-JONES J. This is an appeal from a decision of the Full Court of the Supreme Court of the Northern Territory.[1] The ultimate question in the appeal is whether the Director of National Parks ("the DNP"), established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"), can be criminally liable for breach of the prohibition imposed by s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("the Sacred Sites Act") against carrying out work on a "sacred site" within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[2] No question is raised as to the validity of the Sacred Sites Act or as to the consistency of the Sacred Sites Act with the EPBC Act.

2 The answer to the ultimate question turns on the proper construction of s 34(1) of the Sacred Sites Act. The answer is that the DNP can be criminally liable for breach of the prohibition it imposes. The critical consideration informing that answer is that the DNP is established by s 514E(1)(a) of the EPBC Act as a body corporate.

3 Section 34(1) of the Sacred Sites Act is expressed to impose a prohibition on a "person": "[a] person shall not carry out work on ... a sacred site". The *Interpretation Act 1978* (NT) ("the Interpretation Act") defines "person" to include a body politic and a body corporate[3] and provides that "a reference to a person generally includes a reference to a body politic and body corporate as well as an individual".[4]

4 Section 34(1) of the Sacred Sites Act then sets out what it refers to as the "Maximum penalty". The maximum penalty applicable "[i]n the case of a natural person" is expressed to be a specified number of "penalty units"[5] or imprisonment for two years. The maximum penalty applicable "[i]n the case of a body corporate" is expressed to be a higher specified number of penalty units. That setting out of a maximum penalty applicable in the case of a body corporate as well as in the case of a natural person leaves no room for doubt that contravention of the prohibition

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1 *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1.

2 See s 3 of the Sacred Sites Act (definition of "sacred site").

3 See s 17 of the Interpretation Act (definition of "person").

4 See s 24AA(1) of the Interpretation Act.

5 See s 17 of the Interpretation Act (definition of "penalty unit") and s 4(1) of the *Penalty Units Act 2009* (NT).

by a body corporate is a criminal offence punishable on a finding of guilt by a penalty not exceeding the applicable maximum.[6]

5 Section 34(1) of the Sacred Sites Act therefore applies in its terms to render the DNP criminally liable for breach of the prohibition it imposes on the simple basis that the DNP is a body corporate.

6 The Attorney-General of the Commonwealth, who intervened in the underlying proceeding and who is in consequence a respondent to the appeal, invokes overlapping common law presumptions to argue that s 34(1) of the Sacred Sites Act should nonetheless be read down to have no penal application in the case of a body corporate created by the legislature of a body politic other than the Northern Territory and intended by that legislature to be an instrumentality having the status of that other body politic.

7 For reasons to be explained, neither of the common law presumptions invoked supports the construction for which the Attorney-General contends. The more general presumption, that a statute does not bind the Crown, is addressed and displaced by s 4(1) of the Sacred Sites Act. The more specific presumption, that a statute does not impose a criminal remedy against the Crown, has no application to a body corporate.

8 Whether the EPBC Act can be construed to manifest an intention on the part of the Commonwealth Parliament that the DNP is to be an instrumentality having the status of the Commonwealth – rendering the DNP capable of being described (in old and "inapt"[7] metaphors) as within the "shield",[8] or as having the "privileges and immunities",[9] of "the Crown in right of the Commonwealth"[10] – therefore need not be explored. Either way, the DNP is within the scope of the criminal liability created by s 34(1) of the Sacred Sites Act.

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6 See ss 38B and 38C(1)(b) of the Interpretation Act.

7 *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 654-655 [22].

8 cf *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 230.

9 cf *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 291.

10 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347 [17]; *Sue v Hill* (1999) 199 CLR 462 at 501 [90], 502 [92].

The presumption that a statute does not "bind the Crown"

9 Each of the "Commonwealth of Australia"[11] and "each State of the Commonwealth"[12] is established by the *Constitution* as a body politic, being a distinct "juristic entity".[13] Each body politic is so established with its own "Executive Government"[14] to which is consigned the executive power of the body politic, including power to exercise such property rights as are vested in the body politic.[15] Though it might have been expected at federation that each body politic would be referred to in legislation simply as "the Commonwealth" or "a State", legislative practice has been to treat the Commonwealth and a State each as an emanation of "the Crown" and to refer instead to "the Crown in right of the Commonwealth" or "the Crown in right of a State".[16]

10 The *Northern Territory (Self-Government) Act 1978* (Cth) ("the Self-Government Act") similarly establishes the "Northern Territory of Australia" as a distinct "body politic under the Crown"[17] having its own "Administration" to which is consigned the executive power of the Territory.[18] Legislative practice has similarly been to refer to the body politic so established as "the Crown in right of the Territory" or the "Territory Crown".

11 There is a longstanding general presumption of the common law of Australia against construing a statute to "bind the Crown". The presumption endures notwithstanding that, in consequence of *Bropho v Western Australia*,[19] the

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11 Covering cl 6 of the *Constitution*.

12 Section 106 of the *Constitution*.

13 *The Commonwealth v Rhind* (1966) 119 CLR 584 at 599.

14 Chapter II of the *Constitution* and s 119 of the *Constitution*.

15 *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 40-41 [75].

16 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347 [17]; *Sue v Hill* (1999) 199 CLR 462 at 501 [90], 502 [92].

17 Section 5 of the Self-Government Act.

18 Part IV of the Self-Government Act.

19 (1990) 171 CLR 1.

presumption has only "weak operation",[20] amounting to no more than a presumption that "the Crown is not bound by statute unless a contrary intention can be discerned from all the relevant circumstances".[21] To "bind the Crown" within the meaning of the presumption is to alter or impair "the existing legal situation" of a body politic,[22] including by imposing a liability on the body politic or by constraining an activity sought to be undertaken in the exercise of executive power by the executive government of the body politic.[23]

12 The general common law presumption "extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation".[24] Applied to a statute enacted by the Legislative Assembly of the Northern Territory, the presumption is against construing the statute to bind the Crown in right of the Commonwealth or the Crown in right of a State as well as against construing the statute to bind the Crown in right of the Territory.

13 Section 4(1) of the Sacred Sites Act is in form and effect an express and comprehensive rebuttal of that general common law presumption. In providing that the Sacred Sites Act "binds the Territory Crown and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities", s 4(1) puts beyond doubt that the Sacred Sites Act is intended by the Legislative Assembly to bind the Crown in right of the Commonwealth and the Crown in right of each State as well as the Crown in right of the Territory. In going on to provide that an emanation of the Territory Crown is liable to be prosecuted for an offence against the Sacred Sites Act "*as if* it were a body corporate", s 4(2) implicitly confirms that a body corporate is liable to be prosecuted for such an offence by

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20 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 445.

21 See *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 28 [42], quoting *Bropho v Western Australia* (1990) 171 CLR 1 at 28.

22 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 151-152 [168]-[170]; *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 651 [7], 654-655 [21]-[24], 669 [65]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 34-35 [59]-[61]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 443-444 [18].

23 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347 [18].

24 *Jacobsen v Rogers* (1995) 182 CLR 572 at 585.

virtue of being a body corporate. Section 4(2) is addressed solely to the criminal liability of the Territory Crown.

14 Section 4(1) and (2) of the Sacred Sites Act together leave open the potential for application to s 34(1) of the Sacred Sites Act, in respect of the Crown in right of the Commonwealth and the Crown in right of each State, of the further and more specific common law presumption against construing a statute to impose criminal liability on "the Crown" recognised by Dixon J in *Cain v Doyle*.[25] That further presumption needs now to be examined.

The presumption that a statute does not impose criminal liability on the Crown

15 Though at common law the sovereign could "do no wrong", the Ministers and servants of the sovereign remained subject to the ordinary law of the land even when doing the sovereign's bidding: it was and remains fundamental to the common law conception of the rule of law that "[i]f an act is unlawful – forbidden by law – a person who does it can claim no protection by saying that he acted under the authority of the Crown".[26] The incapacity of the executive government of a body politic to dispense with obedience to the law was and remains "the cornerstone of a parliamentary democracy".[27]

16 The incapacity of the executive government to dispense with obedience to the law entails for the Commonwealth, amongst other things, that:[28]

> "The executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth. The Governor-General, the federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land."

17 That is the constitutional context within which the specific common law presumption against construing a statute to impose criminal liability on the Crown recognised by Dixon J in *Cain v Doyle* must be understood. The question in *Cain v Doyle* was whether the Commonwealth could be a principal offender of the

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25 (1946) 72 CLR 409 at 424.

26 *Clough v Leahy* (1904) 2 CLR 139 at 155-156.

27 *A v Hayden* (1984) 156 CLR 532 at 580; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427-428. See also *Bropho v Western Australia* (1990) 171 CLR 1 at 21, 26-27.

28 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 444, quoting *A v Hayden* (1984) 156 CLR 532 at 562.

offence of terminating the employment of a protected person contrary to the *Re-establishment and Employment Act 1945* (Cth). The holding was that it could not. Reasoning to the conclusion that the offence-creating provision did not extend to the Commonwealth, Dixon J said in *Cain v Doyle* that there was "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".[29] That was and remains the classic statement of the presumption.

18 Dixon J referred in *Cain v Doyle* to several quotidian considerations operating to support the presumption. They included the lack of any summary procedure to which the Crown was then amenable, the fact that any fine payable by the Commonwealth would be payable into the Treasury of the Commonwealth, and the fact that any fine payable by the Commonwealth could in any event be remitted by the Commonwealth.[30] But those considerations were peripheral. Dixon J expressed the principle underlying the presumption in terms that "the Crown is not liable to be sued criminally for a wrong ... and ... is not under the coercive power of the law" even though "in many cases the commands of the Crown are under the directive power of the law which makes an unlawful act invalid and leaves the persons executing the commands, if they need a justification, obnoxious to its provisions".[31] His Honour said that he was "not aware that under any statute there has ever been a criminal remedy against the Crown itself" and concluded that "[t]he principle that the Crown cannot be criminally liable for a supposed wrong, therefore, provides a rule of interpretation which must prevail over anything but the clearest expression of intention".[32]

19 To similar effect, Latham CJ said that "the fundamental idea of the criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence".[33]

20 Since *Cain v Doyle*, express statutory imposition of criminal liability on a body politic or an emanation of a body politic has occurred with increasing frequency. Indeed, express imposition of criminal liability on a body politic has

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29 (1946) 72 CLR 409 at 424.

30 (1946) 72 CLR 409 at 424-425.

31 (1946) 72 CLR 409 at 425.

32 (1946) 72 CLR 409 at 425.

33 (1946) 72 CLR 409 at 418.

become a common feature of statutes providing for occupational health and safety.[34]

21 To the extent the *Cain v Doyle* presumption can be said to have been "based upon the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty",[35] the foundation for the presumption must therefore be acknowledged to have weakened with the passage of time. With the increasing frequency of express imposition of criminal liability on bodies politic, the quotidian considerations to which Dixon J referred as supporting the presumption have all either disappeared or faded in significance.

22 That change in circumstances emboldened the Chief Executive Officer of the Aboriginal Areas Protection Authority to go so far as to argue that the *Cain v Doyle* presumption should now be abandoned. The argument was supported by the Northern Land Council, the Gunlom Aboriginal Land Trust and two Jawoyn traditional owners and custodians of the relevant sacred site, all of whom were granted leave to intervene in the appeal.

23 No differently from the common law presumption that a statute does not "bind the Crown" reconsidered in *Bropho*, the *Cain v Doyle* presumption that a statute does not impose criminal liability on "the Crown" cannot be treated as "immune from curial reassessment and revision".[36]

24 But in considering whether the *Cain v Doyle* presumption should now be abandoned or substantially revised, significant weight must be accorded to the fact that the existence of the presumption in the terms formulated by Dixon J has been repeatedly acknowledged in this Court in the years since *Bropho*: in *Jacobsen*

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34 eg, s 10(2) of the *Work Health and Safety Act 2011* (Cth); s 10(2) of the *Work Health and Safety Act 2011* (NSW); s 13(2) of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW); s 10(2) of the *Work Health and Safety Act 2011* (Qld); s 10(2) of the *Work Health and Safety Act 2012* (SA); s 10(2) of the *Work Health and Safety Act 2012* (Tas); s 10(2) of the *Work Health and Safety Act 2011* (ACT). See also s 3(2) of the *Electrical Safety Act 2002* (Qld); s 9(2) of the *Safety in Recreational Water Activities Act 2011* (Qld); s 13(2) of the *Child Safety (Prohibited Persons) Act 2016* (SA); s 3(2) of the *Children and Young People (Safety) Act 2017* (SA); s 5(2) of the *Disability Inclusion Act 2018* (SA).

35 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270. See also at 277.

36 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 22 [58], citing *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18.

v Rogers,[37] *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*,[38] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*,[39] *Telstra Corporation Ltd v Worthing*,[40] *X v Australian Prudential Regulation Authority*,[41] and *Wurridjal v The Commonwealth*.[42] Now to depart from the presumption formulated in those terms would destabilise well-entrenched legislative assumptions.

25 To maintain the *Cain v Doyle* presumption is one thing; now to extend the presumption would be quite another. The question whether the *Cain v Doyle* presumption should be understood to extend to a presumption against construing a statute to impose criminal liability on a governmental entity other than a body politic was noted in *X v Australian Prudential Regulation Authority*[43] without needing to be explored. The question, now being squarely raised, must be answered in the negative.

26 The underlying principle identified by Dixon J in *Cain v Doyle* provides no justification for extending the common law presumption against construing a statute to impose criminal liability on the Crown beyond what his Honour there referred to as the imposition of "a criminal remedy against the Crown itself". That is to say the underlying principle provides no justification for treating the common law presumption as anything more than a presumption against construing a statute to impose criminal liability on a body politic. To extend the presumption to an executive officer of a body politic would be to invert the constitutional principle which prevents such an officer from claiming immunity from criminal liability by claiming to have acted under the authority of the Crown. To extend the presumption to a corporate instrumentality of a body politic would involve an equivalent inversion of principle.

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37 (1995) 182 CLR 572 at 587.

38 (1996) 189 CLR 253 at 270, 277, 294.

39 (1997) 190 CLR 410 at 427, 472.

40 (1999) 197 CLR 61 at 75 [22].

41 (2007) 226 CLR 630 at 636 [14].

42 (2009) 237 CLR 309 at 380-381 [164].

43 (2007) 226 CLR 630 at 636 [14].

27 Neither *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[44] nor *Telstra Corporation Ltd v Worthing*[45] should be understood as having endorsed extending the presumption in *Cain v Doyle* to a presumption against construing a statute to impose criminal liability on a governmental entity other than a body politic.

28 The question in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* was whether a body corporate created by the legislature of New South Wales was liable to pay stamp duty on an instrument under the *Stamp Act 1921* (WA). A majority (Brennan CJ, Dawson, Toohey and Gaudron JJ) held that the *Stamp Act* evinced an intention to "bind the Crown", other than in respect of the imposition of criminal liability for failing to present an instrument for stamping, making it immaterial to consider whether the body corporate was to be treated as "the Crown" and, if so, whether the body corporate had the benefit of the *Cain v Doyle* presumption.[46] To the extent that McHugh and Gummow JJ might be interpreted as having contemplated an extension of the *Cain v Doyle* presumption to the imposition of criminal liability on a body corporate,[47] theirs was a minority view expressed in the course of an analysis primarily directed not to the question of the status of the body corporate as "the Crown" but to the different and broader question[48] of the status of the body corporate as "the State" for constitutional purposes.

29 The question in *Telstra Corporation Ltd v Worthing* was relevantly whether a body corporate created by the Commonwealth Parliament under the *Telecommunications Act 1975* (Cth) ("the Commonwealth Act"), which contained an immunity provision stating that the body corporate was not subject to any obligation or liability under State law to which the Commonwealth itself (ie, the body politic) was not subject,[49] was an "employer" within the meaning of the *Workers Compensation Act 1987* (NSW) ("the State Act"). The unanimous holding was that the body corporate was an "employer" within the meaning of the State

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44 (1996) 189 CLR 253.

45 (1999) 197 CLR 61.

46 (1996) 189 CLR 253 at 270.

47 (1996) 189 CLR 253 at 277, 294.

48 See *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 229-231; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 67-68 [15]-[16].

49 Section 21(3) of the *Telecommunications Act 1975* (Cth).

Act[50] but that the effect of the immunity provision was to render the State Act inconsistent with the Commonwealth Act and therefore pro tanto inoperative by force of s 109 of the *Constitution*.[51] There is no analogous provision in the EPBC Act. Moreover, as was noted at the beginning of these reasons for judgment, no question is raised in this appeal as to the consistency of the Sacred Sites Act with the EPBC Act.

30 The outcome is that the *Cain v Doyle* presumption should be maintained in the terms stated by Dixon J in that case. The presumption is strong but narrow. It is against construing a statute to impose criminal liability on a body politic. It has nothing to say against construing a statute to impose criminal liability on a natural person or a body corporate.

31 Having regard to the *Cain v Doyle* presumption, s 34(1) of the Sacred Sites Act is properly construed to exclude the imposition of criminal liability on the Commonwealth but not to exclude the imposition of criminal liability on the DNP or on any officer of the Commonwealth.

Disposition of the appeal

32 The appeal should be allowed. The consequential orders proposed by Gordon and Gleeson JJ should be made.

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50 (1999) 197 CLR 61 at 74 [17]-[18].

51 (1999) 197 CLR 61 at 75 [24].

33 GORDON AND GLEESON JJ. The issue in this appeal is whether the Director of National Parks ("the DNP"), a body corporate, is exposed to criminal prosecution and penalty for breach of s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("the Sacred Sites Act"), which prohibits a person from carrying out work on or using a sacred site. The answer is "Yes".

34 The DNP was a corporation sole established under s 15 of the *National Parks and Wildlife Conservation Act 1975* (Cth) and is continued in existence as a body corporate under ss 514A and 514E of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). It has a number of statutory functions, including administering, managing and controlling Commonwealth reserves.[52]

35 Kakadu National Park is a Commonwealth reserve. Gunlom Falls, within Kakadu National Park, is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the Land Rights Act") and is held in fee simple by the Gunlom Aboriginal Land Trust on behalf of the Jawoyn people. Gunlom Falls was leased to the DNP by the Land Trust on condition that it be a Commonwealth reserve, under the EPBC Act, jointly managed by the DNP and the Jawoyn people under a plan of management. The Kakadu National Park Management Plan 2016-2026 was the relevant plan of management.

36 In March 2019, the DNP engaged a contractor to perform construction works on the realignment of the walking track at Gunlom Falls. The area on which the track works were carried out is sacred to the Jawoyn people or is otherwise of significance according to Aboriginal tradition, and is a sacred site under the Sacred Sites Act. The DNP caused the works to be undertaken without permission, namely without an Authority Certificate or a Minister's Certificate under the Sacred Sites Act. The Chief Executive Officer of the Aboriginal Areas Protection Authority ("the Authority") charged the DNP with an offence against s 34(1) of the Sacred Sites Act.

37 The Attorney-General of the Commonwealth intervened in the Local Court of the Northern Territory under s 78A of the *Judiciary Act 1903* (Cth) to submit on behalf of the Commonwealth that the DNP is not liable to prosecution for breach of s 34(1) of the Sacred Sites Act. The Local Court stated a special case for the opinion of the Supreme Court of the Northern Territory, which was referred to the Full Court. Subject to certain defences, the DNP admitted that the facts set out in the special case would constitute an offence under s 34(1) of the Sacred Sites Act. However, the DNP pleaded not guilty on the basis that it cannot be convicted

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52 EPBC Act, s 514B(1)(a).

of the offence created by s 34(1) of the Sacred Sites Act, relying on the interpretive principle enunciated in *Cain v Doyle*.[53]

38 The Full Court held that the DNP, as a government instrumentality, enjoyed the privileges and immunities of "the Crown", or the Executive Government of the Commonwealth, including the presumption against the imposition of criminal liability in *Cain v Doyle*. The Full Court answered the question of law in the special case as follows: "The offence and penalty prescribed by s 34(1) of the [Sacred Sites Act] do not apply to the [DNP] as a matter of statutory construction."

39 The Authority was granted special leave to appeal to this Court.[54] Although the Authority's primary argument in written submissions was that *Cain v Doyle* should be reopened and overruled, during the hearing the submissions focused on the narrower argument that the Full Court erred in applying *Cain v Doyle* for the benefit of the DNP as a Commonwealth statutory corporation. The Authority said that it was not asking the Court to reopen *Cain v Doyle*, but rather to identify the outer limits of it. For the reasons that follow, the appeal should be allowed. The *Cain v Doyle* presumption is limited to the body politic. The offence and penalty prescribed by s 34(1) of the Sacred Sites Act do apply to the DNP.

40 The question in this appeal is narrow; it is about the scope and application of the interpretive principle in *Cain v Doyle*. The answer given is not to be understood as directly or indirectly answering different questions which might arise about whether a person or body corporate may be considered "a State" or "the Commonwealth" under the *Constitution*[55] or may be able to claim other immunities or privileges of "the Crown" in other contexts.[56]

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53 (1946) 72 CLR 409.

54 In this Court, the DNP filed a submitting appearance. The Attorney-General of the Commonwealth, the second respondent, made submissions opposing the appeal. Leave to intervene was granted to the Northern Land Council, the Gunlom Aboriginal Land Trust and Joseph and Billy Markham.

55 See *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 229-230; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* ("*SASB*") (1996) 189 CLR 253 at 282-284; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 67-68 [15]-[16], 75-76 [45].

56 See *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 394-395; *Townsville Hospitals Board v Townsville City Council* (1982)

Presumptions

41 It is presumed that legislation does not bind the Crown ("the *Bropho* presumption").[57] A rationale for the *Bropho* presumption is that, "in general, acts of the legislature are meant to regulate and direct the acts and rights of citizens and, in most cases, the reasoning applicable to them applies with very different, and often contrary, force to the government itself".[58] It is also presumed that legislation does not make the Crown liable to be prosecuted for or convicted of an offence ("the *Cain v Doyle* presumption").[59] This presumption has been described as based upon "the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty".[60]

42 Both presumptions apply to the construction of the laws of one Australian jurisdiction and their application to the Crown in the right of that jurisdiction and other Australian jurisdictions.[61] Both are now properly described as principles of statutory construction, not as part of the prerogative.[62] Both are rebuttable

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149 CLR 282 at 288-289, 291-292; *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 662 [44], 669 [65].

57 *Bropho v Western Australia* (1990) 171 CLR 1 at 14-24. See also *Jacobsen v Rogers* (1995) 182 CLR 572 at 585-586; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 346-347 [16]-[17]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 27-28 [41]-[42]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 439-440 [2], 443-444 [18], 451-453 [52]-[54], 468-470 [104]-[109].

58 *Tomaras* (2018) 265 CLR 434 at 452 [53], referring to *The Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 410 [35], in turn quoting *United States v Hoar* (1821) 26 Fed Cas 329 at 330. See also *Roberts v Ahern* (1904) 1 CLR 406 at 418; *Tomaras* (2018) 265 CLR 434 at 443-444 [18].

59 (1946) 72 CLR 409 at 424; see also 419.

60 *SASB* (1996) 189 CLR 253 at 270.

61 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 121-123, 127-129, 134-136; *Jacobsen* (1995) 182 CLR 572 at 585, 601-603; *SASB* (1996) 189 CLR 253 at 264, 270; *Mining Act Case* (1999) 196 CLR 392 at 409-410 [32], 411 [36]; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 75 [22].

62 *Bropho* (1990) 171 CLR 1 at 15; *Baxter* (2007) 232 CLR 1 at 27 [40]; *Tomaras* (2018) 265 CLR 434 at 451 [52]. See also Seddon, "The Crown" (2000)

presumptions, not strict rules of construction. As these reasons will show, while both presumptions refer to "the Crown", there are circumstances, of which this appeal is one, where the content being given to the expression "the Crown" needs close examination.

43 *Bropho* and *Cain v Doyle* are sometimes described as part of one presumption existing on a continuum (or as having general and specific applications).[63] On that understanding, the presumption applies with extraordinary force, or has extraordinary strength, 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. In *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* ("SASB"), four Justices of this Court described the presumptions as being distinct.[64] In this case, it is useful to treat the presumptions as separate and to draw out three differences between them because, as will be explained, the Sacred Sites Act does evince an intention to bind the Crown.[65]

44 *First*, the *Bropho* presumption goes to whether the statute binds the Crown; the *Cain v Doyle* presumption goes to whether the statute exposes the Crown to criminal liability. In other words, the *Bropho* presumption is directed to whether a statute makes an act or omission by or on behalf of the Crown unlawful, whereas the *Cain v Doyle* presumption is directed to whether the Crown is criminally responsible for an unlawful act or omission proscribed by statute. Even if a statute binds the Crown, it is presumed not to expose the Crown to criminal prosecution, conviction or penalty. The Crown may be bound to comply with the provisions in an Act but at the same time may not be exposed to criminal liability for breach of those provisions.[66]

45 This is a distinction that was made in *Cain v Doyle*. Under the legislation in that case, s 18(1) created an offence for an "employer" to terminate the

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28 *Federal Law Review* 245 at 254; Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 229 [9.380].

63 See, eg, *Bropho* (1990) 171 CLR 1 at 23; *Tomaras* (2018) 265 CLR 434 at 470 [108]-[109], cf 472-473 [116]. See also Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 270 [10.120].

64 (1996) 189 CLR 253 at 270.

65 See Barrett, "Prosecuting the Crown" (2002) 4 *University of Notre Dame Australia Law Review* 39 at 59-60.

66 *Cain v Doyle* (1946) 72 CLR 409 at 423, 425; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 265; *SASB* (1996) 189 CLR 253 at 270-271. cf *Telstra* (1999) 197 CLR 61 at 75 [22]-[23].

employment of an employee in certain circumstances and s 10(1) specified that "employer" included the Crown (whether in right of the Commonwealth or a State) and any authority constituted by or under the law of the Commonwealth or of a State or Territory of the Commonwealth. The defendant submitted that "upon its proper construction s 18 does not impose penalties upon the Crown but binds the Crown by a legislative direction depending upon the constitutional and legal remedies appropriate to the Crown and stops short of including the Crown in the liability to the punishment appointed for a violation of its provisions".[67] Dixon J agreed with that distinction, observing that in that case "no one doubts that the prohibition contained in s 18(1) against terminating the employment of a reinstated employee applies to the Crown ... The whole question is whether the words at the foot of the sub-section – 'Penalty: One hundred pounds,' apply to the Crown."[68] His Honour went on to conclude that that penalty in s 18(1) did not apply to the Crown.[69]

46 In other words, a single provision may have both directive aspects and penal aspects.[70] It may prohibit conduct as well as create criminal liability for engaging in the prohibited conduct. It may impose obligations as well as create criminal liability for failure to comply with those obligations. The directive aspects of the provision may bind the Crown, even if the penal aspects do not. Depending on the terms of the statute, and the circumstances, civil remedies for breach or anticipated breach of the statute might be available, such as a declaration or an injunction.[71]

47 *Second*, the scope of protection or application is different. The *Bropho* presumption applies to the benefit of the Crown or body politic itself, and also to those who act on its behalf – government instrumentalities, employees and agents acting in the course of their functions or duties.[72] Or, more precisely, the *Bropho* presumption presumes that legislation does not impair or affect the

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67 *Cain v Doyle* (1946) 72 CLR 409 at 423.

68 *Cain v Doyle* (1946) 72 CLR 409 at 425.

69 *Cain v Doyle* (1946) 72 CLR 409 at 426.

70 See Barrett, "Prosecuting the Crown" (2002) 4 *University of Notre Dame Australia Law Review* 39 at 66-67. See also *Cain v Doyle* (1946) 72 CLR 409 at 425.

71 See *Bropho* (1990) 171 CLR 1 at 10, 25.

72 *Bropho* (1990) 171 CLR 1 at 15-16, 24-25; *Mining Act Case* (1999) 196 CLR 392 at 410 [33], 429 [105]; *Baxter* (2007) 232 CLR 1 at 26-27 [39]; *Tomaras* (2018) 265 CLR 434 at 452-453 [52]-[54]. See also *British Broadcasting Corporation v Johns* [1965] Ch 32 at 81.

legal position of the Crown and, because the Crown can act only through its servants or agents,[73] the presumption extends to those servants or agents.[74]

48 By contrast, the *Cain v Doyle* presumption has been held not to benefit natural persons who act with the authority or purported authority of the Crown – be they servants or agents.[75] One question in this appeal, which is addressed below, is whether the *Cain v Doyle* presumption is limited to the body politic.

49 *Third*, the *Cain v Doyle* presumption is of stronger force than the *Bropho* presumption. Depending on the circumstances, the *Bropho* presumption may represent little more than a starting point for ascertaining legislative intent.[76] All the circumstances must be considered in determining whether the presumption has been rebutted, including but not limited to "the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound".[77] The strength of the *Bropho* presumption has varied over time. If the Act in issue was enacted before *Bropho* was decided, that is just one circumstance to be taken into account.[78]

50 By contrast, the *Cain v Doyle* presumption may only be displaced with "the clearest expression of intention".[79] As stated by Dixon J in *Cain v Doyle*,

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73 See *Bropho* (1990) 171 CLR 1 at 16, quoting *British Broadcasting Corporation* [1965] Ch 32 at 78-79. See also *Cain v Doyle* (1946) 72 CLR 409 at 425.

74 *Tomaras* (2018) 265 CLR 434 at 443-444 [18], 451-453 [52]-[54]. See also *Wynyard* (1955) 93 CLR 376 at 393-394; *McNamara* (2005) 221 CLR 646 at 655 [23]-[24].

75 *Jacobsen* (1995) 182 CLR 572 at 587. See also *Cain v Doyle* (1946) 72 CLR 409 at 424-425; *Bropho* (1990) 171 CLR 1 at 21, 25, 26-27; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 380-381 [164]-[165]. See also *A v Hayden* (1984) 156 CLR 532 at 580-582; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427-428, 472.

76 *Bropho* (1990) 171 CLR 1 at 23; *Tomaras* (2018) 265 CLR 434 at 451-452 [52], 470 [109].

77 *Bropho* (1990) 171 CLR 1 at 28. See also *Baxter* (2007) 232 CLR 1 at 28 [42]; *Tomaras* (2018) 265 CLR 434 at 452 [52].

78 *Bropho* (1990) 171 CLR 1 at 23.

79 *Cain v Doyle* (1946) 72 CLR 409 at 425. See also *Telstra* (1999) 197 CLR 61 at 75 [22]; *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 636 [14].

"[t]here is ... 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".[80] His Honour went on to explain that "[i]t is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them."[81]

51 Relatively few cases in this Court apply or even refer to the *Cain v Doyle* presumption. However, none of those cases have doubted the presumption, instead describing it variously as "extraordinarily strong",[82] only rebutted in "exceptional circumstances",[83] and requiring for its rebuttal "the clearest indication of a legislative purpose".[84]

52 In *Bropho*, the "extraordinarily strong" presumption against a legislative intent that the general words of a statute should be construed in a way that would make "the Sovereign herself or himself in the right of the Commonwealth or of a State liable to prosecution and conviction for a criminal offence" was stated without referring to *Cain v Doyle*.[85] In these reasons, the reference to the *Cain v Doyle* presumption is retained. It is that presumption – or more precisely, its scope and application – that is the primary focus of this appeal.

53 Is the DNP exposed to criminal liability for breach of s 34(1) of the Sacred Sites Act? It is necessary to turn to the Act.

Sacred Sites Act

54 The Sacred Sites Act seeks "to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites,

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80 *Cain v Doyle* (1946) 72 CLR 409 at 424 (emphasis added).

81 *Cain v Doyle* (1946) 72 CLR 409 at 424.

82 *Bropho* (1990) 171 CLR 1 at 23; *Tomaras* (2018) 265 CLR 434 at 470 [108].

83 *SASB* (1996) 189 CLR 253 at 270.

84 *Telstra* (1999) 197 CLR 61 at 75 [22]; *Wurridjal* (2009) 237 CLR 309 at 380-381 [164].

85 *Bropho* (1990) 171 CLR 1 at 23.

providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister".[86] It was enacted by the Legislative Assembly of the Northern Territory in 1989, pursuant to the grant of legislative power in s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) and s 73(1)(a) of the Land Rights Act to make laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory.

55 The Act applies to all sacred sites throughout the Territory. A "sacred site" is defined by reference to the definition in the Land Rights Act, namely a site that is "sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition".[87] Sacred sites may be registered under Pt III, Div 2 of the Sacred Sites Act. A sacred site, however, will be a sacred site regardless of whether it is registered.

56 Divisions 1A, 1 and 3 of Pt III provide for certificates to authorise "persons" to do such things as would otherwise be criminal offences under the Act. Section 19B provides that a person who proposes to use or carry out work on land may apply to the Authority for an Authority Certificate. Section 22 provides that the Authority shall issue an Authority Certificate in relation to an application under s 19B where it is satisfied of one or other of two conditions. First, the work or use of the land could proceed or be made without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land.[88] Second, an agreement has been reached between the custodians and the applicant.[89] The Minister also has a power to issue a Minister's Certificate under s 32(1)(b) at the conclusion of a review procedure provided for in the Act.[90] The effect of an Authority Certificate or Minister's Certificate is that, subject to any conditions of the certificate, a person may enter and remain on the land in the application, and do such things on the land as are reasonably necessary for carrying out the work or

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86 Sacred Sites Act, Long Title.

87 Sacred Sites Act, s 3 (definition of "sacred site"); Land Rights Act, s 3(1) (definition of "sacred site").

88 Sacred Sites Act, s 22(1)(a).

89 Sacred Sites Act, s 22(1)(b).

90 Sacred Sites Act, ss 3 (definition of "Minister's certificate") and 32(1)(b).

use of the land.[91] As has been explained, the DNP did not have an Authority Certificate or Minister's Certificate.

57 Part IV of the Sacred Sites Act sets out offences and penalties in relation to sacred sites.[92] Section 34, the offence provision at issue in this appeal, provides:

> "(1) A *person* shall not carry out work on or use a sacred site.
>
> Maximum penalty: In the case of a natural person – 400 penalty units or imprisonment for 2 years.
>
> In the case of a body corporate – 2 000 penalty units.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, an Authority Certificate or a Minister's Certificate permitting the defendant to do so." (emphasis added)

58 Other offences include entry onto sacred sites;[93] desecration of sacred sites;[94] and contravention of the conditions of a certificate.[95] There are statutory defences to the offences under ss 33, 34(1) and 35, which are not in issue in this appeal.[96] Each of the offences applies to "persons". Under s 17 of the *Interpretation Act 1978* (NT), "person" in an Act includes a body politic and a body corporate.[97]

59 Does s 34(1) of the Sacred Sites Act bind the Crown as a "person"? That question is addressed directly in s 4, headed "Act binds Crown". It states:

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91 Sacred Sites Act, ss 25 and 32(2).

92 A prosecution for an offence against the Act or Regulations may only be brought by the Authority: Sacred Sites Act, s 39.

93 Sacred Sites Act, s 33.

94 Sacred Sites Act, s 35.

95 Sacred Sites Act, s 37.

96 Sacred Sites Act, s 36.

97 See also *Interpretation Act 1978* (NT), s 24AA.

"(1) This Act binds the Territory Crown and, to the extent the legislative power of the Legislative Assembly permits, *the Crown in all its other capacities*.

(2) If the Territory Crown in any of its capacities commits an offence against this Act, the Territory Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.

(3) This section does not affect any liability of an officer, employee or agent of the Territory Crown to be prosecuted for an offence.

(4) In this section:

Territory Crown means the Crown in right of the Territory and includes:

(a) an Agency[98]; and

(b) an authority or instrumentality of the Territory Crown." (emphasis added)

60 Section 4(1) evinces an express intention to bind the Crown, including "the Crown in all its ... capacities". Section 4(1) is a statement of the Legislative Assembly's intention that the provisions of the Sacred Sites Act, including s 34(1), should apply to the Executive Governments of the Commonwealth, States and Territories, and their instrumentalities, employees or agents acting in the course of their functions or duties.[99] That is, the Sacred Sites Act evinces an intention to bind all "persons" indifferently to its provisions, consistently with the purpose of the Act to protect sacred sites wherever those sites are located in the Territory.

61 In this appeal, and in the Full Court below, it was accepted that the Commonwealth is bound to comply with the provisions of the Sacred Sites Act, including its legal obligations and prohibitions. It was also common ground in this appeal that the word "person" in s 34(1) includes a body politic. That is, all persons – natural persons, body corporates and body politics – are prohibited under s 34(1) of the Sacred Sites Act from carrying out work on or using a sacred site.

62 Put in different terms, the *Bropho* presumption was rebutted.

63 There is then the separate question of whether s 34(1) of the Sacred Sites Act exposes a body politic to criminal liability. The answer is yes, in part.

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98 See definition of "Agency" in *Interpretation Act 1978* (NT), s 18A(1).

99 See *Bropho* (1990) 171 CLR 1 at 15-16, 24-25.

The body politic of the Northern Territory of Australia is exposed to criminal liability. The bodies politic of the other States, the Australian Capital Territory and the Commonwealth are not.

64 First, it is relevant to observe that the maximum penalty that follows s 34(1) specifies a penalty for a natural person and a penalty for a body corporate. There is no penalty specified for a body politic.[100]

65 As explained, the presumption that a statute does not expose the Crown to criminal prosecution, conviction or penalty may only be displaced with "the clearest expression of intention".[101] Section 4(2) of the Sacred Sites Act provides such a clear expression of legislative intention in respect of the "Territory Crown", defined as meaning the Crown in right of the Territory and as including Agencies, authorities and instrumentalities. It provides that, if the Territory Crown in any of its capacities commits an offence against the Sacred Sites Act, the Territory Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate. That means that the penalty specified in s 34(1) for a body corporate could be imposed on the Territory Crown.

66 The Sacred Sites Act, however, does not contain a clear expression of intention to make the Crown in right of the Commonwealth liable to be prosecuted (or the Crown in right of the other States or the Australian Capital Territory). It was not in dispute that the Sacred Sites Act does not seek to expose the Commonwealth (as a body politic) to criminal liability for breach of s 34(1). Indeed, both parties accepted that a negative implication could be drawn from s 4(2) to (4) that the Act did not seek to make the Commonwealth criminally liable.

67 That construction is supported by the legislative history of s 4. Prior to 2006, s 4 stated that "This 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." That is, it was similar in terms to the current s 4(1).

68 In 2006, the *Northern Territory Aboriginal Sacred Sites Amendment Act 2005* (NT) repealed s 4 and substituted it with the current section. However, when the Bill which eventually became that Act was introduced into the Legislative Assembly, s 4 was proposed to be substituted with:

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100 See also *Interpretation Act 1978* (NT), ss 38B and 38C.

101 *Cain v Doyle* (1946) 72 CLR 409 at 425. See also *Telstra* (1999) 197 CLR 61 at 75 [22]; *X* (2007) 226 CLR 630 at 636 [14].

"(1) This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

(2) *If the Crown in any of its capacities commits an offence against this Act, the Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.*

(3) This section does not affect any liability of an officer, employee or agent of the Crown to be prosecuted for an offence.

(4) In this section –

'Crown' includes –

(a) an Agency; and

(b) an authority or instrumentality of the Crown." (emphasis added)

69 When that Bill was read for a second time in October 2005, the Minister for Local Government relevantly explained:[102]

"In the Territory, government agencies and authorities undertake a significant proportion of works for roads, infrastructure and development. It is disappointing to note that, despite encouraging reforms in the monitoring systems of agencies, a percentage of reported sacred sites damage has been caused as a result of actions or approvals by government agencies and authorities. In recent cases of alleged site damage by the government agencies or authorities, *it has become apparent that there is a lack of clarity in the liability of the Crown to be prosecuted for breaches of the* Northern Territory Aboriginal Sacred Sites Act, or accordingly, some prosecutions have not been pursued despite sufficient evidence.

The inability to prosecute the Crown for sacred site damage and thus seek a form of reparation is a source of dissatisfaction amongst both authority members and the Aboriginal custodians.

The bill provides an appropriate capacity to prosecute the Crown by clarifying that:

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102 Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2005 at 1062-1063.

- *if the Crown in any of its capacities commits an offence against the* Northern Territory Aboriginal Sacred Sites Act, *then it is liable in that capacity*;

- the 'Crown' includes agencies, authorities and instrumentalities of the Crown; and

- *the existing liability of an officer, employee or agent of the Crown to be prosecuted for an offence is not affected.*" (emphasis added)

70 In December 2005, the Government invited the defeat of cl 4 of the Bill in order to substitute a narrowed version of s 4(2) to (4), which replaced the reference to "the Crown" with the "Territory Crown" as it presently appears.[103] The Attorney-General of the Northern Territory said:[104]

> "*The* Northern Territory Aboriginal Sacred Sites Act *currently binds the Crown but, in case law, this is not always clear. Case law would indicate that individual employees and agents of the Crown are liable to prosecution already*. This is made clear in the amendment. However, *this amendment also intends to make it clear that agencies and authorities are liable for prosecution as well*.
>
> On the question of whether the amendment is able to bind the Crown or the Northern Territory government, there has been further information sought on this from the Solicitor-General. I will not share that with the House; I will leave that to the minister carrying the next stage of the debate. *Certainly, the Solicitor-General has clarified the situation between the two governments*." (emphasis added)

71 The Minister assisting the Chief Minister on Indigenous Affairs then said:[105]

> "I also want to talk about the liability of the Crown. The *Northern Territory Aboriginal Sacred Sites Act* already binds the Crown but, in this case, the law is not always clear. I am aware that *we are going to invite the defeat of section 4, that part that applies to the Commonwealth*, and we will give

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103 Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1352.

104 Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1349.

105 Northern Territory of Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1351.

> an explanation about that later.[106] *Case law indicates that individual employees and agents of the Crown are liable to prosecution already. This is made very clear in the amendment.*
>
> *This amendment also intends to make it clear that agencies and authorities are liable to prosecution as well, and that is what did not occur in the previous act*." (emphasis added)

72 It is therefore apparent that, consistently with what appears from the text of s 4(2) to (4) as enacted, there was a deliberate choice by the Legislative Assembly to apply those sub-sections only to the Territory Crown, not the Crown in all its capacities. Put in different terms, as the Authority submitted, "the original Bill would have extended criminal liability both in the Territory and in the Commonwealth beyond bodies corporate and natural persons into the very heart of the body politic through the deeming mechanism. After discussion with the Commonwealth, the Territory pulled back to impose that extra punishment on itself but not on the Commonwealth."

73 The Commonwealth Attorney-General argued that a further "negative implication" could be drawn from s 4(2) to (4) that Commonwealth statutory corporations were also not liable to prosecution and penalty under s 34(1) of the Sacred Sites Act. That is, the Attorney argued that, on the proper construction of s 4(2) to (4), the intention of the Legislative Assembly not to impose criminal liability on the DNP as a body corporate was clear, even without regard to the *Cain v Doyle* presumption. That contention is rejected.

74 The Commonwealth Attorney-General relied on the breadth of the definition of "Territory Crown" in s 4(4), arguing that the Act takes a broad view of the "Crown" beyond merely the body politic. The Attorney submitted that there is nothing in s 4(2) to (4) that draws a distinction between corporate or non-corporate manifestations of the Territory Crown. On the Attorney's submission, the "authority or instrumentality" referred to in s 4(4)(b) may have independent corporate personality (for example, the appellant itself is established as an authority under s 5 of the Sacred Sites Act as a body corporate) and the reference to "agent" in s 4(3) is only to natural persons. In sum, the Attorney argued that the Legislative Assembly sought to bring the Territory body politic proper as well as all its extended corporate and non-corporate authorities or instrumentalities within the reach of the criminal law. Critically, however, s 4(2) to (4) do that work *only* for the Territory Crown. According to the Attorney, the negative implication to be drawn from that section, demonstrated by the legislative history of s 4, was that the Legislative Assembly decided *not* to impose

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106 No explanation is subsequently recorded in the Debates.

criminal liability on Commonwealth authorities or instrumentalities, even those with independent legal personality.

75 The problem with the Commonwealth Attorney-General's submission is that s 4(2) to (4) only address the position of the Territory Crown. One can draw a negative implication from those provisions that the Legislative Assembly was willing to make the Territory body politic subject to prosecution as if it were a body corporate and that it was not willing to do so in relation to other bodies politic. The purpose of s 4(2) to (4) was to ensure that the Crown in right of the Territory, in all its capacities including unincorporated capacities, is able to be prosecuted. To the extent that the definition of "Territory Crown" includes incorporated bodies that would in any event be exposed to criminal prosecution, that may reflect a cautious approach to the scope of the *Cain v Doyle* presumption. It draws too long a bow to make a more expansive negative inference that the Legislative Assembly was intending to exclude the incorporated bodies of other States and the Commonwealth from criminal liability that would otherwise be imposed by the general provisions of the Act.

76 Therefore, contrary to the Commonwealth Attorney-General's submission, the question in this appeal is not answered by the drawing of a negative implication from the text, context and legislative history of s 4(2) to (4) of the Sacred Sites Act to the effect that the DNP is not exposed to criminal liability as a Commonwealth statutory corporation.

77 The question then is whether the DNP, a body corporate constituted under the EPBC Act, is entitled to the benefit of the *Cain v Doyle* presumption that legislation does not make the Crown liable to be prosecuted for or convicted of an offence under s 34(1) of the Sacred Sites Act. As will be explained, the answer is "No". The *Cain v Doyle* presumption is limited to the body politic, the DNP is not the body politic, and the EPBC Act did not confer on the DNP any immunity or presumptive immunity from criminal liability imposed by statute.

Cain v Doyle **presumption limited to the body politic**

78 It is first useful to clarify what is meant by "body politic", "the Commonwealth", "the Executive Government of the Commonwealth", "the Crown" and "the Crown in right of the Commonwealth" in this context.

79 In 1901, the colonies federated as the Commonwealth of Australia "under the Crown of the United Kingdom of Great Britain and Ireland".[107]

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107 *Constitution*, preamble. See Saunders, "The Concept of the Crown" (2015) 38 *Melbourne University Law Review* 873 at 885. See also *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 40 [75].

The *Constitution*, in identifying the new body politic which it established, does not use the term "the Crown"; instead, it uses the terminology of "the Commonwealth".[108]

80 The Commonwealth and States are distinct persons under the *Constitution*.[109] The Commonwealth as a legal person is comprised of three branches separated under the *Constitution*: the Parliament (Ch I), the Executive Government (Ch II) and the Judicature (Ch III).[110] The branches of government do not have separate legal personality.[111] The Commonwealth and the States are capable of the ownership of property, of enjoying rights and incurring obligations, and of suing and being sued, and this is not merely as between the government and private persons, but by each government as distinguished from and as against each other government.[112] The same can be said of the Northern Territory.[113]

81 The expression "the Crown" "normally means the Sovereign considered as the central government of the Commonwealth or a State"[114] – that is, the Commonwealth, the State or the Territory as it acts through the executive branch. When referring to the exercise of the executive power of the Commonwealth through the Executive Government of the Commonwealth,

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108 See, eg, *Constitution*, covering clauses 3 and 6 (definition of "the Commonwealth") and ss 1, 61, 71. See also *Sue v Hill* (1999) 199 CLR 462 at 498 [84]; Saunders, "The Concept of the Crown" (2015) 38 *Melbourne University Law Review* 873 at 887.

109 See *Sue v Hill* (1999) 199 CLR 462 at 501 [90]-[91]; *Hocking* (2020) 271 CLR 1 at 40 [75], 87-88 [213].

110 *Williams v The Commonwealth* (2012) 248 CLR 156 at 184 [21], 185 [23], 237 [154]; *Hocking* (2020) 271 CLR 1 at 40 [75]; *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 231 [68]; 408 ALR 381 at 399-400.

111 *Williams* (2012) 248 CLR 156 at 184 [21], 237 [154]; *Davis* (2023) 97 ALJR 214 at 231 [68]; 408 ALR 381 at 399-400.

112 *Sue v Hill* (1999) 199 CLR 462 at 501 [90], quoting Moore, "The Crown as Corporation" (1904) 20 *Law Quarterly Review* 351 at 359.

113 The Northern Territory of Australia is established as a body politic under the Crown by s 5 of the *Northern Territory (Self-Government) Act 1978* (Cth), by exercise of the legislative power under s 122 of the *Constitution*. See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 265-266, 271-273.

114 *Wynyard* (1955) 93 CLR 376 at 393.

and when referring to its control, the distinct legal personality of the Commonwealth as a body politic has traditionally been expressed as "the Crown in right of the Commonwealth".[115]

82 The Authority submitted that there are no decisions in this Court that apply *Cain v Doyle* beyond the body politic to a statutory body or corporation with independent legal personality. The Commonwealth Attorney-General submitted that there are two such decisions – *Telstra Corporation Ltd v Worthing*[116] and *SASB*[117]. It is necessary to examine this Court's primary authorities that refer to the *Cain v Doyle* presumption in chronological order – *Cain v Doyle*, *Bropho v Western Australia*[118], *Jacobsen v Rogers*[119], *SASB, Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[120], *Telstra* and *Wurridjal v The Commonwealth*[121] – to identify how the Court in those cases described who gets the benefit of the presumptive immunity.

83 What that analysis will reveal is that no decision of this Court has held that the presumption in *Cain v Doyle* extends beyond the body politic.[122] And, as will be explained, there is no basis to extend the presumption. That is not to deny the fact that the legislature may expressly or impliedly confer on a body an immunity or presumptive immunity from criminal laws. But it did not do so in this case.

Cain v Doyle

84 In *Cain v Doyle*, Latham CJ's view was in the nature of a rule that "the Crown in right of the Commonwealth" was incapable of being prosecuted by the Commonwealth.[123] However, Ministers and officers of the Crown could be

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115 *Hocking* (2020) 271 CLR 1 at 40-41 [75]; see also 88 [213].

116 (1999) 197 CLR 61.

117 (1996) 189 CLR 253.

118 (1990) 171 CLR 1.

119 (1995) 182 CLR 572.

120 (1997) 190 CLR 410.

121 (2009) 237 CLR 309.

122 See also *X* (2007) 226 CLR 630 at 636 [14].

123 *Cain v Doyle* (1946) 72 CLR 409 at 417-418.

guilty of breaches of Commonwealth law.[124] Dixon J (with Rich J agreeing) described it as a presumption for the benefit of "the Executive Government" or "the Crown itself".[125] In doing so, Dixon J distinguished "the Crown" from "its Ministers and servants".[126]

Bropho

85 In *Bropho*, the Act that established the Western Australian Development Corporation ("the WADC") expressly provided that it was an agent of the Crown in right of the State and enjoyed the status, immunities and privileges of the Crown.[127] The appellant had commenced proceedings in the Supreme Court of Western Australia against the State of Western Australia and the WADC seeking a declaration and injunction under the *Aboriginal Heritage Act 1972* (WA), which was struck out on the ground that the Act did not bind the Crown. The issue on appeal was whether s 17 of the Act (which created an offence for damaging an Aboriginal site) applied to the Crown or to instrumentalities or individuals acting on its behalf.[128]

86 The Court held that the Act evinced an intention that all natural persons, including government employees, should be bound.[129] The joint judgment observed that government employees acting in the course of their duties could be found guilty of an offence under s 17.[130] It followed that the WADC had no power to authorise its employees or others to carry out activities of the type proscribed by the section.[131] That being so, declaratory and injunctive relief would be available on the facts alleged in the statement of claim.[132] It was, therefore,

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124 *Cain v Doyle* (1946) 72 CLR 409 at 418.

125 *Cain v Doyle* (1946) 72 CLR 409 at 424, 425.

126 *Cain v Doyle* (1946) 72 CLR 409 at 425.

127 *Bropho* (1990) 171 CLR 1 at 11.

128 *Bropho* (1990) 171 CLR 1 at 13-14.

129 *Bropho* (1990) 171 CLR 1 at 24-25; see also 28.

130 *Bropho* (1990) 171 CLR 1 at 25.

131 *Bropho* (1990) 171 CLR 1 at 25.

132 *Bropho* (1990) 171 CLR 1 at 25.

unnecessary for the purposes of the appeal to consider whether the WADC itself was liable to prosecution or conviction for an offence against s 17.[133]

87 In the course of setting out the relevant principles, the joint judgment observed that, if the question in issue is whether the general words of a statute should be construed in a way which would make "*the Sovereign herself or himself* in the right of the Commonwealth or of a State" liable to prosecution and conviction for a criminal offence, the presumption against a legislative intent to that effect would be extraordinarily strong.[134] Brennan J, who wrote separately, described the principle in *Cain v Doyle* as applying to the imposition of criminal liability on "the Crown".[135] This was contrasted with the imposition of criminal liability on servants and agents even when acting within the scope of authority given by the Crown.[136]

Jacobsen

88 *Jacobsen* raised the question of whether s 10 of the *Crimes Act 1914* (Cth) bound the Crown in right of the State of Western Australia so as to subject it to the execution of two search warrants issued pursuant to that section authorising the Australian Federal Police to enter and search the Fisheries Department of Western Australia. In the course of their analysis, the majority observed that:[137]

> "It is ... important to recognize that the Crown, being relevantly the executive branch of government, carries out in modern times multifarious functions involving the use and occupation of many premises and the possession of many things. It carries out those functions through *servants and agents* who, notwithstanding that they act with the authority of the Crown, *have no immunity from the ordinary criminal law*.[138] The Crown *itself* may not be subjected to criminal liability, save in the most exceptional

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133 *Bropho* (1990) 171 CLR 1 at 25.

134 *Bropho* (1990) 171 CLR 1 at 23 (emphasis added), citing cf *Canadian Broadcasting Corporation v Attorney-General for Ontario* [1959] SCR 188 at 204-205.

135 *Bropho* (1990) 171 CLR 1 at 26, referring to *Cain v Doyle* (1946) 72 CLR 409 at 424.

136 *Bropho* (1990) 171 CLR 1 at 27.

137 *Jacobsen* (1995) 182 CLR 572 at 587.

138 See *Bropho* (1990) 171 CLR 1 at 21, 26; *Hayden* (1984) 156 CLR 532 at 580-582.

circumstances,[139] but *those who actually occupy Crown premises or hold Crown property are in a different position*." (emphasis added)

89 The majority reasoned that, accordingly, there may exist on Crown premises things which will afford evidence of the commission of an offence, whether the offence is committed by a servant or agent of the Crown or by someone else.[140] The majority held that the *Bropho* presumption was rebutted, having regard to the main purpose of s 10, which was to facilitate the investigation and prosecution of criminal offences.[141]

SASB

90 *SASB* was the first decision that the Commonwealth Attorney-General argued was authority that *Cain v Doyle* may apply for the benefit of a statutory corporation. In *SASB*, Brennan CJ, Dawson, Toohey and Gaudron JJ appeared to assume in obiter that the State Authorities Superannuation Board ("the SASB") could be "the Crown" for the purpose of the *Cain v Doyle* presumption, but determined that it was not necessary to decide that question for the purposes of the appeal because the SASB was bound to pay stamp duty under the *Stamp Act 1921* (WA) irrespective of whether it was exposed to criminal liability for failure to pay.[142]

91 McHugh and Gummow JJ observed that the *Cain v Doyle* presumption has been said to apply where a statute has conferred the immunity of the Crown upon a body or corporation,[143] and stated that the SASB would be "the State" for the purposes of the *Cain v Doyle* presumption.[144] Three aspects of that reasoning should be noted. First, the statements were obiter; second, the first statement is qualified by the words "has been said to apply"; and third, the authorities cited do not directly support or are contrary to the proposition.

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139 See *Cain v Doyle* (1946) 72 CLR 409 at 424.

140 *Jacobsen* (1995) 182 CLR 572 at 587.

141 *Jacobsen* (1995) 182 CLR 572 at 588.

142 *SASB* (1996) 189 CLR 253 at 270.

143 *SASB* (1996) 189 CLR 253 at 277, citing *Bolwell v Australian Telecommunications Commission* (1982) 42 ALR 235 at 241 and *R v Eldorado Nuclear Ltd* [1983] 2 SCR 551 at 565-567.

144 *SASB* (1996) 189 CLR 253 at 294.

92 The first authority cited by McHugh and Gummow JJ was *Bolwell v Australian Telecommunications Commission*[145], a decision of the Federal Court of Australia (Smithers J) where it was held that the relevant provision did not bind the Crown – the Crown was not "within [the provision's] statutory command"[146] – and therefore did not bind the defendant statutory corporation "as an emanation of the Crown".[147] In coming to that conclusion, Smithers J treated *Cain v Doyle* as the strongest end of the general presumption that legislation does not bind the Crown, requiring an "unequivocal indication" where the statutory provision is a penal provision.[148]

93 The second authority cited by McHugh and Gummow JJ, *R v Eldorado Nuclear Ltd*,[149] does distinguish between a statute binding the Crown and a statute exposing the Crown to criminal liability, and is contrary to the proposition that the presumption against the latter applies for the benefit of statutory corporations acting on behalf of the Crown. In that case a majority of the Supreme Court of Canada held that the relevant legislation did not bind the Crown, and that the statutory corporations were immune because they were agents of the Crown.[150] Dickson J, writing for the majority, expressly rejected the notion that Crown agents are immune from criminal liability for unlawful acts, observing that "[t]he maxim that the Queen can do no wrong is a legal fiction which, at common law, serves the purpose of preventing the Queen from being impleaded in her own courts. *There is, however, no comparable maxim that an agent of the Queen can do no wrong*."[151] The statutory corporations were not criminally liable because the acts were not unlawful, as the Act did not bind the Crown and the corporations were acting on the Crown's behalf,[152] not because the *Cain v Doyle* presumption applied for the benefit of the corporations as agents of the Crown.

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145 (1982) 42 ALR 235.

146 *Bolwell* (1982) 42 ALR 235 at 238.

147 *Bolwell* (1982) 42 ALR 235 at 237-238, 241-244.

148 *Bolwell* (1982) 42 ALR 235 at 241.

149 [1983] 2 SCR 551.

150 *Eldorado Nuclear* [1983] 2 SCR 551 at 562-565.

151 *Eldorado Nuclear* [1983] 2 SCR 551 at 564 (emphasis added).

152 *Eldorado Nuclear* [1983] 2 SCR 551 at 564-566, 577-578.

94 To the extent that McHugh and Gummow JJ's obiter statements suggest that the *Cain v Doyle* presumption extends beyond the body politic, they are to be disregarded.

Residential Tenancies

95 *Residential Tenancies* was not a case dealing with the *Cain v Doyle* presumption; however, two members of the Court made observations that are relevant to this case. The analysis of Brennan CJ made clear that servants and agents of the Crown do not have any presumptive immunity from criminal law. His Honour stated that:[153]

> "If a servant or agent of the Crown fails to perform [a] duty [to be performed under penalty] or engages in ... prohibited conduct, a question arises as to whether the servant or agent is immune from criminal liability by reason of his or her employment or agency. If the act is done or the omission is made in exercise of a statutory power conferred by a valid law of the Commonwealth, the servant or agent is immune from criminal liability by reason of the inconsistency between the State law and the Commonwealth law that confers the power. The question is simply one of inconsistency under s 109 of the Constitution. But if the proscribed act is done or the proscribed omission is made by the servant or agent without statutory authority, there is no prerogative power in the Crown in right of the Commonwealth to dispense the servant or agent from liability under the State criminal law."

96 The analysis of Gummow J directly referred to *Cain v Doyle*. His Honour stated that:[154]

> "[W]hen one speaks of a State law which purports to 'bind' the Commonwealth ... the law in question ... may establish a regulatory regime enforced by criminal sanctions as well as civil remedies. It may be one thing to expose one element in the federation to civil action by another and, indeed, s 75(iii) and (iv) provides for federal jurisdiction in such matters, but it is another thing altogether to expose an element in the federation to criminal sanction.
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> ... It would be to enter into another dimension to conclude that a State might create a criminal offence committed by the Commonwealth in respect of the

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153 *Residential Tenancies* (1997) 190 CLR 410 at 427.

154 *Residential Tenancies* (1997) 190 CLR 410 at 472.

conduct by the Commonwealth *itself* of its Executive Government." (emphasis added, footnote omitted)

Telstra

97 *Telstra* was the other decision that the Commonwealth Attorney-General argued was authority that *Cain v Doyle* may apply for the benefit of a statutory corporation. This case is instructive because, on a close analysis, one can see that the opposite is true.

98 The Court had to determine whether the *Workers Compensation Act 1987* (NSW) applied to the Australian Telecommunications Commission ("the ATC"). The ATC was a body corporate established by the *Telecommunications Act 1975* (Cth) and, by s 21(3) of that Act, was *not* subject to any requirement, obligation, liability, penalty or disability under a law of a State to which the Commonwealth was not subject.

99 The ATC was held to be an "employer" within the terms of the State legislation.[155] The question was whether it took the benefit of s 21(3) and the extent of the benefit. The Court distinguished between the ATC and "the Commonwealth", on the basis that the ATC derived its powers and duties from statute and did not exercise the executive power of the Commonwealth.[156] The Court held that the ATC was exempt from liability under the *Workers Compensation Act* because: first, "the Commonwealth" had the benefit of the *Cain v Doyle* presumption;[157] second, the penal provisions were central to the structure of the regulatory scheme and did not bind the Commonwealth; and third, there was an express provision (s 21(3)) which provided that the ATC was not subject to any liability or penalty to which the Commonwealth was not subject.[158] That is, the ATC was only exempt from liability because of that express provision, *not* because it had the benefit of the *Cain v Doyle* presumption. By operation of s 109 of the *Constitution*, the *Workers Compensation Act* was inoperative to the extent that it purported to impose liability on the ATC. The EPBC Act does not contain any such provision in relation to the DNP.

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155 *Telstra* (1999) 197 CLR 61 at 74 [18].

156 *Telstra* (1999) 197 CLR 61 at 73 [15], 74 [17]-[18].

157 Indeed, there was an express provision in the Act that nothing in the statute rendered "the Crown" liable to prosecution.

158 *Telstra* (1999) 197 CLR 61 at 75 [22]-[25].

Wurridjal

100 In *Wurridjal*, there were four sacred sites located on land in respect of which a lease was granted to the Commonwealth under the *Northern Territory National Emergency Response Act 2007* (Cth). Gummow and Hayne JJ observed that the interests of the first and second plaintiffs in relation to those sacred sites were protected by s 69 of the Land Rights Act.[159] Section 69 made it an offence for a person to enter or remain on land in the Territory that is a sacred site. Their Honours explained that, in accordance with accepted principles of statutory construction explained by Dixon J in *Cain v Doyle*, it would require the "clearest indication of legislative purpose" to demonstrate that such a penal provision attached to the Commonwealth "*as a body politic*".[160] There was no such indication.[161]

101 However, importantly, their Honours held that the prohibition imposed by s 69 would apply to "officers of the Commonwealth and other parties".[162] That is, government employees and other parties – as opposed to the Commonwealth body politic – did not have the benefit of the presumption in *Cain v Doyle*.

Cain v Doyle presumption should not be extended beyond body politic

102 This case affords an opportunity to confirm, consistently with that long line of authority, that the *Cain v Doyle* presumption does not apply beyond "the Crown" as a body politic.[163] That is, the *Cain v Doyle* presumption does not apply beyond the Commonwealth, States or Territories as bodies politic.[164]

103 It is established that, unlike the *Bropho* presumption,[165] the *Cain v Doyle* presumption does not apply for the benefit of natural persons who act with the authority or purported authority of the Crown or executive government – be they

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159 *Wurridjal* (2009) 237 CLR 309 at 380 [163].

160 *Wurridjal* (2009) 237 CLR 309 at 380-381 [164] (emphasis added), citing *Cain v Doyle* (1946) 72 CLR 409 at 425 and see also *Telstra* (1999) 197 CLR 61 at 75 [22].

161 *Wurridjal* (2009) 237 CLR 309 at 381 [164].

162 *Wurridjal* (2009) 237 CLR 309 at 381 [165].

163 See *Bropho* (1990) 171 CLR 1 at 23.

164 See *Wurridjal* (2009) 237 CLR 309 at 380-381 [163]-[164].

165 *Bropho* (1990) 171 CLR 1 at 15-16.

servants or agents.[166] The Commonwealth Attorney-General accepted that natural persons forming part of the executive government are bound by criminal norms of general application, but contended that some statutory corporations fall within a special category that can share the body politic's presumptive immunity. The statutory corporations said to have the benefit of *Cain v Doyle* were those statutory corporations that Parliament intended to "have the same protection as the body politic itself" or to fall within what used to be described as "the shield of the Crown".

104 The executive functions of the executive government are necessarily performed through the agency of persons who "may be natural persons or, as has been increasingly the tendency over [more than one] hundred years, fictitious persons – corporations".[167] Why there should be a different rule for natural persons and fictitious persons was not explained. Each is a distinct legal personality. Each has been held to be able to fall within the so-called "shield of the Crown".[168] A body corporate, like a natural person, may "represent the Crown"[169] or be a "servant or agent"[170] of the Crown. But statutory corporations, whatever their relationship to the executive government, "are not and never do become the Crown itself".[171] Statutory corporations are *not* "the Crown in right of the Commonwealth" or "the Executive Government of the Commonwealth" under the *Constitution*. Statutory corporations are creatures of statute, they have their own distinct legal personality, and their powers (and any immunities) are sourced in statute.[172] Statutory corporations do not have any common law prerogative powers

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166 *Bropho* (1990) 171 CLR 1 at 21, 25, 26-27; *Jacobsen* (1995) 182 CLR 572 at 587; *Wurridjal* (2009) 237 CLR 309 at 380-381 [164]-[165].

167 *Bropho* (1990) 171 CLR 1 at 16, quoting *British Broadcasting Corporation* [1965] Ch 32 at 78-79.

168 *Mersey Docks and Harbour Board Trustees v Cameron* (1865) 11 HLC 443 at 508 [11 ER 1405 at 1430]. See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 452; *Bropho* (1990) 171 CLR 1 at 18-19; *State Bank (NSW)* (1992) 174 CLR 219 at 230.

169 See, eg, *McNamara* (2005) 221 CLR 646 at 659 [35]-[37].

170 See, eg, *Wynyard* (1955) 93 CLR 376 at 382, 388.

171 Evatt, *The Royal Prerogative* (1987) at 245.

172 See *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 84-85; *Rural Bank of NSW v Municipality of Bland* (1947) 74 CLR 408 at 417;

or immunities that may exist as part of the executive power of the Commonwealth in s 61 of the *Constitution*. Although presumptive immunity from criminal prosecution is now regarded as a principle of statutory interpretation rather than a prerogative, it remains that it is only for the benefit of the Crown.

105 The Commonwealth Attorney-General submitted that the "modern rationale" for the *Cain v Doyle* presumption is to recognise that, as a matter of history, the imposition of criminal liability upon the body politic is an unusual step and not something to happen by accident. The Attorney submitted that it has been part of the "working hypothesis", the existence of which is known both to Parliament and to the courts, upon which statutory language will be interpreted.[173] That hypothesis is "an aspect of the rule of law".[174] But it has never been a part of that working hypothesis that bodies other than the body politic have the benefit of the *Cain v Doyle* presumption. A statutory corporation may, however, be able to claim the benefit of rights, privileges or immunities that are similar or equivalent to those to which "the Crown" is entitled,[175] but those rights, privileges or immunities *must be sourced in the statute*.

106 There is no principled basis on which the *Cain v Doyle* presumption should apply to statutory corporations who act with the authority or purported authority of the Crown. Two of the reasons given by Dixon J in *Cain v Doyle*[176] for the presumption do not apply to different legal entities. A fine imposed on a different legal entity to the Crown would not necessarily involve a payment from consolidated revenue to consolidated revenue; and any power to remit a fine would be at the discretion of an entity with a different legal personality.[177]

Wynyard (1955) 93 CLR 376 at 394-395; *Townsville* (1982) 149 CLR 282 at 291-292; *McNamara* (2005) 221 CLR 646 at 656 [26]-[27]. See also Barnett, "Statutory Corporations and 'the Crown'" (2005) 28 *University of New South Wales Law Journal* 186 at 200-203.

173 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28].

174 See *Electrolux* (2004) 221 CLR 309 at 329 [21].

175 Barnett, "Statutory Corporations and 'the Crown'" (2005) 28 *University of New South Wales Law Journal* 186 at 199-200. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 358-359.

176 (1946) 72 CLR 409 at 424-425.

177 See Barrett, "Prosecuting the Crown" (2002) 4 *University of Notre Dame Australia Law Review* 39 at 61.

Those justifications provide no reason to extend its protection, beyond the body politic, to a statutory corporation.

107 The two other reasons given in the same passage by Dixon J do not have contemporary significance. First, Dixon J was concerned that there is no court of summary jurisdiction with jurisdiction over the Crown and no summary procedure to which the Crown is amenable.[178] But such summary jurisdiction can be conferred; in this case the proceedings were brought in the Local Court under s 18(1)(a)(i) of the *Local Court Act 2015* (NT).[179] Second, Dixon J observed that the Crown acts only by its Ministers and servants.[180] The idea appears to have been that it is sufficient to expose those persons to criminal liability when engaging in action which "constitutes or involves the offence on the part of the Crown".[181] As the Authority submitted, this idea does not accord with modern notions of criminal responsibility whereby corporate entities are seen by Parliaments to also be proper subjects for criminal punishment and deterrence.[182] The exposure of natural persons to criminal liability provides no reason why the *Cain v Doyle* presumption should extend to bodies corporate.

108 And that is reinforced by the differences in the rationales underpinning the *Bropho* presumption and the *Cain v Doyle* presumption which have been explained earlier. The rationale for the *Bropho* presumption is against legislation prejudicing or impairing the existing legal position of the Crown or the executive branch of the body politic.[183] That is why the presumption also applies for the benefit of servants and agents of the Crown – because the Crown acts through its servants and agents. The application of an Act to the servants and agents acting in their official capacity is, in legal effect, an application of the Act to the Crown.[184] By contrast, *Cain v Doyle* has a more limited rationale. If the Act evinces an intention to bind the Crown (like the Sacred Sites Act), then the Crown's legal position, in the *Bropho*

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178 *Cain v Doyle* (1946) 72 CLR 409 at 424.

179 See also *Judiciary Act 1903* (Cth), s 67B read with s 2 (definitions of "cause" and "suit").

180 *Cain v Doyle* (1946) 72 CLR 409 at 425.

181 *Cain v Doyle* (1946) 72 CLR 409 at 425.

182 See, eg, *Interpretation Act 1978* (NT), s 38B; *Criminal Code* (NT), s 43BK.

183 See *Wynyard* (1955) 93 CLR 376 at 392-394; *McNamara* (2005) 221 CLR 646 at 654-655 [21]-[24]; *Tomaras* (2018) 265 CLR 434 at 443-444 [18], 452-453 [53]-[55].

184 *Wynyard* (1955) 93 CLR 376 at 394; *McNamara* (2005) 221 CLR 646 at 655 [23].

sense, is already affected. It cannot lawfully instruct its servants or agents to do something that is contrary to the law and its servants or agents will be subject to consequences for breach of the criminal law. The Crown may also be liable to civil consequences. Put in different terms, the extra work done by the *Cain v Doyle* presumption is to protect the body politic from criminal prosecution.

109 Where an Act evinces an intention to bind a statutory corporation and that Act imposes criminal liabilities for breach of its provisions, there is no presumption that the criminal penalties do not apply to the statutory corporation.

Offence and penalty of s 34(1) of Sacred Sites Act apply to DNP

Cain v Doyle presumption does not benefit DNP

110 The DNP is not the same entity as "the Crown" or the body politic of "the Commonwealth of Australia". The DNP is not part of the Executive Government of the Commonwealth under Ch II of the *Constitution*.[185] Rather, the DNP is a body created by Parliament under legislation passed pursuant to Ch I of the *Constitution.*[186]

111 Adapting and adopting what was said by Gummow J in *Residential Tenancies*,[187] "[i]n constituting the [DNP] and vesting it with its own legal personality, the legislature was not adding to the executive arm of the Commonwealth. It is for the Governor-General in Council, acting pursuant to s 64 of the Constitution, to establish any new departments of State of the Commonwealth." Instead, "[t]he [DNP] is the immediate product of federal legislation".[188]

EPBC Act does not confer on DNP immunity or presumptive immunity from criminal liability imposed by statute

112 A statute may expressly provide that a statutory corporation is not liable to any penalty to which the Commonwealth is not subject (as in *Telstra*) or may impliedly do so. As in *Telstra*, the result would be that any State or Territory law

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185 See *Davis* (2023) 97 ALJR 214 at 234 [82], 235 [85]; 408 ALR 381 at 403-404.

186 EPBC Act, ss 514A and 514E. See also *National Parks and Wildlife Conservation Act 1975* (Cth), s 15.

187 (1997) 190 CLR 410 at 469. See also *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [14]; *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 292 [7].

188 See *Residential Tenancies* (1997) 190 CLR 410 at 469.

purporting to impose liability on the statutory corporation would be inoperative to the extent of any inconsistency. However, special privileges and immunities should not be readily implied. As Gibbs CJ, writing for the Court, said in *Townsville Hospitals Board v Townsville City Council*, "[a]ll persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention."[189]

113 A mere statement that the statutory corporation represents the Crown or is an agent of the Crown would not be sufficient to confer on it a presumptive immunity equivalent to the *Cain v Doyle* presumption, given that the presumption only applies in respect of the Crown itself and not its servants or agents. Rather, there would need to be an intention, express or implied, that the statutory corporation be immune or presumptively immune from criminal laws, or that it not be subject to any penalty or liability to which the Commonwealth itself is not subject.

114 The EPBC Act does not expressly confer immunity on the DNP from criminal liability from State and Territory laws in the performance of its functions or powers under the EPBC Act. Nor does it expressly state that the DNP has the status of the Crown, either generally or for the purposes of the presumption against the imposition of criminal liability.

115 Nor is there an implied conferral of immunity or presumptive immunity. Indeed, there are indicators in the EPBC Act that the DNP is not intended to be presumptively exempt from criminal liability. First, it is a separate legal person; it is constituted as a body corporate under s 514E of the EPBC Act. Incorporation, without express immunity, is a powerful contra-indicator of immunity. Second, it may sue and be sued in its corporate name.[190] Third, it is exposed to criminal liability under the EPBC Act[191] but the Commonwealth as a body politic is not exposed to those offences.[192] There is nothing to indicate that

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189 (1982) 149 CLR 282 at 291.

190 EPBC Act, s 514E(1)(c).

191 EPBC Act, s 354A.

192 See EPBC Act, s 4; Australia, Senate, *Environment Protection and Biodiversity Conservation Bill 1998*, Supplementary Explanatory Memorandum at 2.

the DNP was intended under the EPBC Act to possess the same presumptive immunity from criminal liability enjoyed by the Commonwealth.

116 The Commonwealth Attorney-General identified one case, *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* ("*SFIT*"),[193] that was said to be of particular assistance in identifying the factors that guide the task of determining whether a body was intended to have the same privileges and immunities of the Crown. In that case, the question was whether the Superannuation Fund Investment Trust had the benefit of a statutory exemption from stamp duty for conveyances or transfers "to the Crown, or to any person on behalf of the Crown". The problem with the indicia relied on by the Attorney by reference to *SFIT* – chiefly, control by the executive government and the nature of the functions of the statutory corporation – is that those indicia may more generally go to whether the application of the Act to the corporation is, in legal effect, an application of the Act to the Crown or the executive branch of the body politic.[194] The indicia do not address the correct question.

117 As explained, the *Cain v Doyle* presumption has a more limited rationale and scope. It is narrower; it does not extend to servants and agents of the Crown. Factors relevant to whether a body can be characterised as a "servant or agent" of the Crown do not assist in identifying any specific intention to confer on the DNP any immunity or presumptive immunity from criminal law, either generally or when undertaking the statutory functions in issue, including administering, managing and controlling Commonwealth reserves.

Orders

118 The appeal should be allowed. Order 1 of the orders of the Full Court of the Supreme Court of the Northern Territory dated 30 September 2022 should be set aside and, in its place, order that the question referred to the Full Court be answered as follows: "The offence and penalty prescribed by s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) apply to the Director of National Parks as a matter of statutory construction."

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193 (1979) 145 CLR 330.

194 See [108] above.

EDELMAN J.

I. This appeal and a presumption based upon anachronisms and inapt English constitutionalism

> "There is, I think, 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. It is opposed to all our conceptions, constitutional, legal and historical."

119 So said Dixon J, in *Cain v Doyle*,[195] with the agreement of Rich J.[196] The consequence, Dixon J explained, was to require "clear expression of a valid intention" and "at least ... quite certain indications that the legislature had adverted

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195 (1946) 72 CLR 409 at 424.

196 (1946) 72 CLR 409 at 419.

to the matter and had advisedly resolved upon so important and serious a course".[197]

120 It can be a sign of lack of clarity of principle when a legal principle or rule comes to be known by reference to the case in which it was first set out rather than by reference to any point of principle. The "presumption in *Cain v Doyle*" (in the terms in which it was described on this appeal) did not even command the support of a majority of the Court when the case was decided. More fundamentally, every consideration cited by Dixon J in support of the presumption, and the ultimate foundation claimed for the presumption, was, or is now, based on an incorrect premise or English constitutional notions that were displaced upon Federation in 1901.

121 For nearly eight decades there has been confusion about the meaning of the "presumption in *Cain v Doyle*", the flexibility with which to apply the "presumption in *Cain v Doyle*", the extent of the operation of the "presumption in *Cain v Doyle*" including the connotation of the "Crown", and whether there are exceptions to the "presumption in *Cain v Doyle*". Even the meaning of "presumption" in the "presumption in *Cain v Doyle*" is unclear.

122 The "presumption in *Cain v Doyle*" was applied in this case by the Full Court of the Supreme Court of the Northern Territory. The Full Court, valiantly and diligently endeavouring to apply confused and confusing authority in this Court and in others, held that a Commonwealth statutory corporation, the Director of National Parks ("the DNP"), was immune from any criminal liability for carrying out work on a sacred site,[198] although its employees and contractors were not so immune.

123 One basic issue raised by this case is whether a presumption that is stripped of every basis given for its existence can be sustained in the same form only by its recognition in past authority. That issue was decided in a joint judgment of six members of this Court in *Bropho v Western Australia*,[199] who held that such a view might be of "considerable superficial appeal" but that a rule concerning a presumption "does not, of itself, provide an impregnable foundation for its own observance". In *Bropho v Western Australia*, the joint judgment set out the terms of the "presumption in *Cain v Doyle*" without mentioning the case itself and carefully omitting any reference to the outdated or flawed reasoning of Dixon J.

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197 *Cain v Doyle* (1946) 72 CLR 409 at 424.

198 See *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 34(1).

199 (1990) 171 CLR 1 at 20-21.

The joint judgment then placed the "presumption" upon a new, and intelligible, foundation.[200]

124 The "presumption in *Cain v Doyle*" is now best understood as an example of a particular circumstance in which an inference of immunity from liability will often be very likely to be drawn, despite the absence of any expressly conferred immunity. The particular circumstance is where the object of the immunity is a body politic and the subject matter of the immunity is criminal liability. Even then, however, as in every case, any inference of a statutory implication of immunity will depend upon all the circumstances.

125 The Commonwealth statutory corporation that asserts immunity from criminal liability in this case, the DNP, is not the body politic of the Commonwealth of Australia. The subject matter of the DNP's assertion of immunity from criminal liability concerns an Act of the Legislative Assembly of the Northern Territory which aims to provide protection for a subject matter of enormous significance. That Act, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("the Sacred Sites Act"),[201] among other things, creates an offence which is committed where a natural person or body corporate carries out work on a sacred site without a particular certificate. The DNP is a body corporate.

126 If the DNP had the immunity from criminal liability that it asserts then it could knowingly carry out work on a sacred site without a certificate and without incurring criminal liability. It could knowingly desecrate a sacred site without incurring criminal liability.[202] The DNP could do so even though other bodies corporate could not. The DNP could do so even though natural persons who are members of the Executive Government (being officers, employees or other agents of the body politic of the Commonwealth of Australia) could not. For the reasons below, the Legislative Assembly of the Northern Territory should not be taken to have intended in the Sacred Sites Act to carve out such an immunity from criminal liability for the DNP.

II. The facts and background to this appeal

127 Within Kakadu National Park lies the Gunlom Falls. The Gunlom Falls (including the falls and surrounding area) is sacred to the Jawoyn people and it is a sacred site within the Sacred Sites Act. The land is within *buladjang* (Sickness Country) where *Bula* (Creation Spirit) sleeps.

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200 *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24.

201 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 34(1).

202 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 35.

128 The Gunlom Falls is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and is held on trust for the Jawoyn people by the Gunlom Aboriginal Land Trust. That trustee leased the land to the DNP in accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The lease to the DNP made the land subject to a Plan of Management with joint management by the Jawoyn people and the DNP.

129 The DNP was created by s 15 of the *National Parks and Wildlife Conservation Act 1975* (Cth). The existence of the DNP continues under s 514A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). One of the DNP's functions is to "administer, manage and control Commonwealth reserves and conservation zones".[203] The DNP's powers include entering into contracts and carrying on works.[204]

130 In 2019, the DNP, through a contractor, carried out construction work to realign a walking track at the Gunlom Falls. The construction work included excavating and clearing trees, rock, soil and vegetation and inserting concrete steps. There is no dispute that the construction work was carried out on a sacred site and that the DNP carried out the work without the required authority under the Sacred Sites Act.

131 On 11 September 2020, the appellant in this Court, the Chief Executive Officer of the Aboriginal Areas Protection Authority ("the CEO of the AAPA"), charged the DNP with an offence under s 34 of the Sacred Sites Act of carrying out work on a sacred site. In the Local Court of the Northern Territory at Darwin, a special case was stated for the opinion of the Supreme Court of the Northern Territory. The relevant question of law asked by the special case was whether, as a matter of statutory construction, the offence prescribed by s 34(1) of the Sacred Sites Act applies to the DNP. Grant CJ ordered that the question of law be referred to the Full Court of the Supreme Court of the Northern Territory.

132 The Full Court answered the question reserved by saying that "[t]he offence and penalty prescribed by s 34(1) of the [Sacred Sites Act] do not apply to the [DNP] as a matter of statutory construction". Central to the reasoning of the Full Court was the application of the decision of this Court in *Cain v Doyle*,[205] which the Full Court described as recognising a "presumption that a statute is not properly construed to impose criminal liability on the Crown without the clearest of

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203 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 514B(1)(a).

204 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 514C(2)(a) and (b).

205 (1946) 72 CLR 409.

indications".[206] The Full Court treated the DNP as falling within the denotation of "the Crown" in this "presumption",[207] concluding that the Sacred Sites Act "did not evince a sufficiently clear objective intention to impose criminal liability on the Crown".[208]

133 On this appeal, the CEO of the AAPA submitted that the "presumption in *Cain v Doyle*" should be reopened and overturned—or, perhaps more accurately, restated (or re-explained)[209]—and either subsumed within a general presumption or confined in its application to bodies politic. The CEO of the AAPA submitted that, subject to defences and any inconsistency with Commonwealth legislation (neither of which is relevant to this appeal), the only real obstacle to recognising that the DNP was subject to criminal liability for the offence in s 34 of the Sacred Sites Act was the "presumption in *Cain v Doyle*". The CEO of the AAPA was supported by a joint intervention by the Northern Land Council, the Gunlom Aboriginal Land Trust and two of the traditional Aboriginal titleholders and custodians of the sacred site,[210] Messrs Joseph and Billy Markham.

134 The DNP, the first respondent, did not make any substantive submissions. The Attorney-General of the Commonwealth, the second respondent, submitted that the "presumption in *Cain v Doyle*" should not be reopened, overruled or re-explained. Rather, the presumption should be applied beyond bodies politic to statutory corporations that are created to "have the same legal status as the bod[y] politic". In any event, the Attorney-General submitted, independently of the "presumption in *Cain v Doyle*", s 4 of the Sacred Sites Act contains a negative implication to the same effect. The submission was that the express exclusion in s 4 of the immunity of the body politic of the Northern Territory supported an implied immunity of the body politic of the Commonwealth of Australia, as well as any statutory corporation that was created by the Commonwealth with the intention of it bearing the same immunities as the body politic of the Commonwealth of Australia.

135 For the reasons below, the CEO of the AAPA was correct that the "presumption in *Cain v Doyle*" must be re-explained. The submissions of the

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206 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1 at [26].

207 [2022] NTSCFC 1 at [41]-[43], [65].

208 [2022] NTSCFC 1 at [78].

209 See *Vunilagi v The Queen* (2023) 97 ALJR 627 at 659-662 [153]-[165]; 411 ALR 224 at 260-263.

210 Within the meanings in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

Attorney-General of the Commonwealth, although supported by some decisions in this Court and others, should not be accepted. The starting point to the legal approach to the interpretation of s 34 of the Sacred Sites Act is therefore the meaning of the "presumption in *Cain v Doyle*".

III. The "presumption in *Cain v Doyle*"

136 In *Cain v Doyle*,[211] Mr Wright was reinstated in his employment by the Commonwealth of Australia at the Commonwealth Government's Munition Factory, following his war service. Mr Wright's employment by the Commonwealth was terminated by Mr Doyle, a manager at the factory. Mr Doyle was charged as an accessory to the commission of an offence,[212] namely the offence by the Commonwealth of terminating the employment of a reinstated employee in contravention of s 18(1) of the *Re-establishment and Employment Act 1945* (Cth).

137 A majority of this Court (Latham CJ, Rich, Starke and Dixon JJ) held that Mr Doyle was not liable as an accessory to the offence in s 18(1). Latham CJ and, separately, Dixon J (with whom Rich J agreed) held that the Commonwealth Parliament intended that "the Crown" be prohibited from terminating the employment of a reinstated employee[213] but that the Commonwealth Parliament also intended that the Crown not be subject to punishment for any contravention of that prohibition.[214] In other words, the Crown was not immune from any civil liability such as an injunction or declaration but the Crown was immune from criminal liability.

138 The reasoning of Latham CJ, "a lonely Australian judicial opinion",[215] was based upon the incorrect premise explained later in these reasons that the Commonwealth could never be liable for a criminal offence.[216] By contrast, Dixon J (with whom Rich J agreed) recognised that the Commonwealth might be liable for a criminal offence but relied upon the presumption quoted at the start of these reasons to conclude that the Commonwealth was immune from criminal liability. An assumption made by Dixon J, perhaps reflecting the manner in which the case was argued, was that if the Commonwealth had an immunity from

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211 (1946) 72 CLR 409.

212 *Crimes Act 1914* (Cth), s 5.

213 *Cain v Doyle* (1946) 72 CLR 409 at 419, 425.

214 *Cain v Doyle* (1946) 72 CLR 409 at 419, 426.

215 Hogg, Monahan and Wright, *Liability of the Crown*, 4th ed (2011) at 440 [15.14].

216 *Cain v Doyle* (1946) 72 CLR 409 at 418.

liability, there would be no principal offender and there could therefore be no accessory.[217] Dixon J therefore concluded that Mr Doyle could not be found guilty of procuring or being knowingly concerned with the commission of an offence.[218]

(i) What is "the Crown" in Dixon J's presumption?

139 The definition of an employer in s 10 of the *Re-establishment and Employment Act 1945* (Cth) had included, subject to contrary intention, "the Crown (whether in right of the Commonwealth or of a State)". The reference in Dixon J's discussion of his presumption to "an attempt to impose upon the Crown a liability of a criminal nature" must have been to the "Crown in right of the Commonwealth".[219]

140 The expression "the Crown in right of the Commonwealth" and an even more difficult expression of English origin, "the Crown", are slippery and are capable of various meanings. As Gleeson CJ, Gummow and Hayne JJ said in *Sue v Hill*,[220] Professor Pitt Cobbett identified the expression "the Crown" as a "defective conception ... the outcome of an attempt on the part of English law to dispense with the recognition of the State as a juristic person, and to make the Crown do service in its stead". Their Honours referred to Maitland's preference for the term "the Commonwealth", which would correspond with a description of each State by the State name rather than "the Crown".[221] As Seddon has noted, legislation could follow the model of the *Constitution* and "could just as effectively provide 'This Act binds the Commonwealth' instead of 'This Act binds the Crown in right of the Commonwealth'".[222]

141 But even the expression "the Commonwealth" is not free from ambiguity. Some of its meanings were explored in *Hocking v Director-General of the*

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217 Compare *Pickett v Western Australia* (2020) 270 CLR 323 at 366 [102]; *O'Dea v Western Australia* (2022) 273 CLR 315 at 339-340 [65]; *R v Anna Rowan (a pseudonym)* (2024) 98 ALJR 508 at 523 [77].

218 *Cain v Doyle* (1946) 72 CLR 409 at 426.

219 *Cain v Doyle* (1946) 72 CLR 409 at 423-424.

220 (1999) 199 CLR 462 at 498 [84], citing Cobbett, '"The Crown' as Representing 'the State"' (1903) 1 *Commonwealth Law Review* 23 at 30.

221 *Sue v Hill* (1999) 199 CLR 462 at 498 [84], citing Maitland, "The Crown as Corporation" (1901) 17 *Law Quarterly Review* 131 at 144.

222 Seddon, "The Crown" (2000) 28 *Federal Law Review* 245 at 246. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-283.

National Archives of Australia.[223] The *Constitution* itself uses "the Commonwealth" in different senses. For instance: s 92 refers to "the Commonwealth" in the sense of a physical space; s 118 refers to "the Commonwealth" in the sense of Australian legal jurisdictions; and ss 75(iii), 78, 85, 105, 111 and 114 refer to "the Commonwealth" in the sense of a body that holds legal powers and rights and is subject to legal duties.[224] The last is perhaps the most common usage of "the Commonwealth". It has the same meaning as "the Crown in right of the Commonwealth", which was the phrase used in the *Re-establishment and Employment Act 1945* (Cth). It describes a political entity or body that holds rights and is subject to duties.

142 The holding of rights requires legal personhood, natural or artificial. "At the time of federation,[225] and for centuries before that time,[226] the only artificial persons in English law were corporations, and corporations were either aggregate or sole."[227] Hence, although Maitland saw "no great harm" in the expression "the Crown", this was because he regarded it as apparent that the reference was to a body which he described as a "corporation aggregate".[228] The better nomenclature to describe the political entity of the Commonwealth of Australia as a "right-and-duty-bearing unit"[229] is to follow the language of the *Constitution* but to add the clarity that a reference to the "Commonwealth" is to a legal "person": a "corporation" (from *corpus*), or a "body". In other words, the best description of the legal entity of the Commonwealth as a political body that holds rights and is subject to duties is the "body politic of the Commonwealth of Australia", with

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223 (2020) 271 CLR 1 at 87-89 [212]-[215].

224 See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363.

225 See, eg, Maitland, "The Corporation Sole" (1900) 16 *Law Quarterly Review* 335 at 335.

226 See, eg, Coke, *The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton* (1628) at 2a §1, 250a §413.

227 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171 at 182 [17].

228 Maitland, "The Crown as Corporation" (1901) 17 *Law Quarterly Review* 131 at 140. Compare Seddon, "The Crown" (2000) 28 *Federal Law Review* 245.

229 Maitland, "Moral Personality and Legal Personality" (1905) 6 *Journal of the Society of Comparative Legislation* 192 at 193.

"body politic" used in the sense described by Rousseau to mean a "public person".[230]

143 The body politic of the Commonwealth of Australia has three dimensions of power: the legislative power of the Commonwealth; the executive power of the Commonwealth; and the judicial power of the Commonwealth. The *Constitution* refers to the vesting of each of those dimensions of power: the legislative power in the Commonwealth Parliament;[231] the executive power in the Queen;[232] and the judicial power in the federal courts[233] and State and Territory courts invested with federal jurisdiction.[234] Each type of power remains the power of the body politic of the Commonwealth of Australia and the exercise of that power is attributable to the body politic of the Commonwealth of Australia. The point of the division of the power, and the "vesting" of each division, is to separate the three types of power.

144 The vesting of power is different from the exercise of that vested power. For instance, although Commonwealth judicial power is vested in federal courts and State and Territory courts invested with federal jurisdiction, where a legal challenge is brought to the authority of a decision-maker it is usually brought against the judicial officer who is said to have acted beyond jurisdiction.[235] In relation to executive power, the *Constitution* expressly provides that the executive power that is vested in the Queen "is exercisable by the Governor-General as the Queen's representative",[236] advised by the Federal Executive Council,[237] and acting through Ministers who administer Departments of State.[238] The Executive

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230 Rousseau, "The Social Contract", in Barker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (1947) 237 at 257-258. See *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 87 [212].

231 *Constitution*, s 1.

232 *Constitution*, s 61.

233 *Constitution*, s 71.

234 *Constitution*, ss 71, 77(iii).

235 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193. See also *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25.

236 *Constitution*, s 61.

237 *Constitution*, ss 62, 63.

238 *Constitution*, s 64.

Government is not itself a legal person or "body".[239] Nor are the Departments of State legal persons.[240] A challenge to an executive decision or action is generally brought against the Minister or the responsible officer or agent within the relevant department.

145 The exercise of any type of power of the body politic of the Commonwealth of Australia by any Commonwealth officer, employee or other agent (including sub-agents) will, subject to any immunity from liability, be attributed to the body politic of the Commonwealth of Australia as the body on whose behalf the power was exercised. As Hartford Davis has written:[241]

> "The acts, omissions and states of mind attributed to the [body politic of the] Commonwealth [including through an interposed statutory corporation] will inevitably be the acts and omissions of human beings, usually the human beings comprising the Executive Government of the Commonwealth ... [W]henever the process of [executive] government throws up a need for a constitutional person, it is through the human beings comprising the Executive Government that the constitutional person acts."

146 When Dixon J referred to "the Crown" in *Cain v Doyle*, and when s 10 of the *Re-establishment and Employment Act 1945* (Cth) referred to "the Crown ... in right of the Commonwealth", the references were to a body that holds rights and is subject to legal duties. In that sense, Dixon J, and s 10, could only have been referring to the body politic of the Commonwealth of Australia, which was the employer of Mr Wright. The reference could not have been to the amorphous description of "Executive Government", which is not a legal person but is sometimes also described as "the Crown". Nor could the reference have been to any of the legal persons who exercised the executive power of the body politic of the Commonwealth of Australia in their actions as officers, employees or other agents of the body politic. None of those people was Mr Wright's employer.

147 Some element of confusion arises because Dixon J did refer to the effect of liability of "the Crown" for punishment being an effect on "the Executive Government of the country", saying that the Executive Government "is the

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239 See *Williams v The Commonwealth* (2012) 248 CLR 156 at 184 [21], 237 [154]. See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 231 [68]; 408 ALR 381 at 399-400.

240 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 11 [18].

241 Hartford Davis, "The Legal Personality of the Commonwealth of Australia" (2019) 47 *Federal Law Review* 3 at 6 (footnotes omitted).

practical meaning of the expression Crown in such a connection".[242] Perhaps for this reason, the Full Court in this proceeding held that "the Crown" in *Cain v Doyle* included "the executive branch of government represented by the Ministry and the administrative bureaucracy ... including statutory corporations".[243] That was also how Professor Winterton had understood Dixon J.[244]

148 Although Dixon J had referred to the Executive Government as the "practical meaning" of "the Crown", all that should be understood by this statement is that the effect of punishing the body politic of the Commonwealth of Australia by fine is that the fine will be paid from the "Federal treasury",[245] the Consolidated Revenue Fund, which is, in practice, the source of funds for the activities of the Executive Government. Elsewhere, his Honour was careful to separate "the Crown", in the sense of the body politic of the Commonwealth of Australia, from its agents. "[T]he Crown", he said, "acts only by its Ministers and servants", who could be liable as accessories under s 5 of the *Crimes Act 1914* (Cth) if the Crown were liable as principal, or liable as conspirators under s 86 of the *Crimes Act 1914* (Cth) if an offence was committed on behalf of the Crown.[246] So too, the Crown might act through its creation of a statutory corporation as its agent. But the Ministers, servants, or corporations that act as agents of "the Crown" are not, *themselves*, "the Crown" to which Dixon J was referring when enunciating what has become known as the "presumption in *Cain v Doyle*".

149 The expression "the Crown" is, however, sometimes used in a broader sense when describing an immunity from liability for that "class of departments, organizations and persons generically (and loosely) described as the Crown" where the effect of liability for the legal persons in those departments or organisations "would mean some impairment of the existing legal situation" of a body politic.[247] In this loose use of "the Crown", the immunity extends to officers, employees or other agents of the body politic, including statutory corporations over which there is sufficient executive control to permit their characterisation as agents of the body politic. The immunity might extend even further if, in what has been described as

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242 *Cain v Doyle* (1946) 72 CLR 409 at 424. See also at 431 (Williams J).

243 [2022] NTSCFC 1 at [41].

244 Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) at 207, fn 100.

245 *Cain v Doyle* (1946) 72 CLR 409 at 424.

246 *Cain v Doyle* (1946) 72 CLR 409 at 425.

247 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393.

"derivative Crown immunity",[248] the functions of the holder of the immunity are "looked upon by the law as performed for the Crown" even if the person is not an officer, employee or other agent of a body politic.[249] Precision in identifying the subject of any claim of immunity can only be achieved by avoiding the use of the phrase "the Crown" and substituting for it a clear description of the precise nature of the legal person that is the subject of the claim of immunity.

(ii) The meaning of Dixon J's presumption

150 The opening words of the extract from Dixon J quoted at the start of these reasons describe the strength of a "presumption". Those words immediately invite attention to what is meant by a "presumption". The term is used in a variety of different senses in law.[250] Sometimes it is used in law in the same sense as ordinary communication: a presumption is a standardised inference that arises from "common probabilities of fact".[251] It arises because common experience, such as the experience of the behaviour of humans or nature, generates reasonable expectations that when one fact exists another is also likely to, or ordinarily will, exist.[252] The presence of smoke gives rise to a presumption of fire.

151 Closely related to this is another sense in which "presumption" is used in law. This second sense represents the use of the term by Dixon J in *Cain v Doyle*. This sense is adapted from the usual sense of a standardised inference but requires a legal conclusion to be drawn in the absence of contrary information.[253] By treating Parliament as a notional person, a standardised inference was recognised to the effect that, subject to the force of anything to the contrary, when Parliament legislates to create a criminal offence it does not intend to "impose upon the Crown [in the sense of the body politic] a liability of a criminal nature". That assumption,

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248 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 151 [166].

249 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 394.

250 *Masson v Parsons* (2019) 266 CLR 554 at 575-576 [32], referring to Thayer, "Presumptions and the Law of Evidence" (1889) 3 *Harvard Law Review* 141 and Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), Ch 8.

251 Wills and Lawes, *The Theory and Practice of the Law of Evidence*, 2nd ed (1907) at 43. See also *Thorne v Kennedy* (2017) 263 CLR 85 at 101 [34].

252 *Thorne v Kennedy* (2017) 263 CLR 85 at 101 [34], citing *Calverley v Green* (1984) 155 CLR 242 at 264. See also *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 466-467 [100].

253 *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 at 73 [99]-[100].

or reasonable expectation, about parliamentary intention was based upon the longstanding public experience of Parliament's past approach, which was said to reflect "all our conceptions [of the Crown], constitutional, legal and historical".[254]

152 The term "presumption" was also used in this way by six members of this Court in *Bropho v Western Australia*.[255] Their Honours gave the example of the strong presumption that Parliament will not abolish or modify fundamental common law principles or rights and said that this was founded on "an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear".[256] The foundation of that assumption in reasonable expectations of the public based on longstanding experience means that the less fundamental the principles or rights are, and the more eroded they are, the less force the presumption will have.[257] Further:[258]

> "[i]f such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear."

153 One consequence of this understanding of the nature of legal presumptions is that they are not matters of precedent. The legal treatment of the existence or force of such a presumption might affect reasonable expectations of the public, but the continued recognition of the presumption is based upon those expectations, not the legal rule that recognised the presumption. As the joint judgment said in *Bropho v Western Australia*, "the rule does not, of itself, provide an impregnable foundation for its own observance".[259] Hence, the recognition in *Bropho v Western Australia* that the legal interpretive rule that recognised the presumption in that case should be altered because there were "not infrequent occasions" of legislative

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254 *Cain v Doyle* (1946) 72 CLR 409 at 424.

255 (1990) 171 CLR 1 at 23-24.

256 *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

257 *Stephens v The Queen* (2022) 273 CLR 635 at 653-654 [34], referring to *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [32] and *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159]. See also *Hurt v The King* (2024) 98 ALJR 485 at 506 [106].

258 *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

259 (1990) 171 CLR 1 at 21.

practice that departed from an "inflexible" or "stringent and rigid" application of that interpretive rule.[260] The change did not require the reopening of any past decision but instead reflected the present state of reasonable expectations.

154 Since a presumption in this sense is not a matter of precedent, when this Court reformulated the presumption in *Bropho v Western Australia*, it did so with prospective effect only, in the sense that the Court did not "overturn the settled construction of particular existing legislation".[261] The Court recognised that it "may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests [for the application of the presumption] were seen as of general application at the time when the particular provision was enacted".[262]

(iii) The examples given by Dixon J do not support his presumption

155 In *Cain v Doyle*,[263] Dixon J gave four examples to support his "presumption against general words bearing such a meaning" as to impose criminal liability upon the body politic of the Commonwealth of Australia. Consistently with the concept of a presumption as a standardised inference which is drawn based upon common experience, his Honour described these examples as "considerations which have a daily application".[264] Unfortunately, each of the examples was, or is now, based on a mistaken understanding of the law or a misconceived attempt bluntly to apply English constitutional concepts to Australian law after 1901.

156 First, Dixon J said that "[t]here is no Court of summary jurisdiction with jurisdiction over the Crown and no summary procedure to which the Crown is amenable, that is apart from the consent of the Crown".[265] That has long ceased to be the case. In relation to the present proceedings, s 18(1)(a)(i) of the *Local Court Act 2015* (NT) confers jurisdiction on the Local Court of the Northern Territory to hear and determine a charge of a summary offence and s 67B of the *Judiciary Act 1903* (Cth) provides that the Northern Territory may bring a suit in respect of any

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260 (1990) 171 CLR 1 at 21-22.

261 (1990) 171 CLR 1 at 22.

262 *Bropho v Western Australia* (1990) 171 CLR 1 at 23. Compare *Ha v New South Wales* (1997) 189 CLR 465 at 503-504; see also at 515.

263 (1946) 72 CLR 409 at 424-425.

264 *Cain v Doyle* (1946) 72 CLR 409 at 424.

265 *Cain v Doyle* (1946) 72 CLR 409 at 424.

cause (including a criminal proceeding[266]) against "the Commonwealth" (meaning the body politic of the Commonwealth of Australia).

157 Secondly, Dixon J said that, with a limited exception, "the whole of a forfeiture, fine or penalty would presumably go to the Federal treasury; and yet a fine imposed is payable by the treasury".[267] As Latham CJ put the point, "[t]here is no reason in a provision that the Commonwealth shall pay a fine to itself".[268] That conception of the inutility of a person imposing a fine on itself is no longer, if it ever were, accurate. First, where different bodies politic are involved the fine will be paid to a different source (in this case, the Central Holding Authority of the Northern Territory[269]). So too, in circumstances such as the present, the activities of the party paying the fine might not be directly funded from consolidated revenue.[270] In any event, the need for a ministerial department to account for the cost of a fine would permit political scrutiny of the department.[271] The imposition of a fine could also have consequences for third parties, as it could have in *Cain v Doyle* itself where a penalty upon conviction could have been ordered to be paid, in part, to compensate the employee, Mr Wright.[272]

158 Thirdly, Dixon J said that "[i]t is for the Crown to remit fines".[273] So it is. But that power is exercised by the relevant Vice-Regal officer of the body politic whose officers of the Executive Government prosecuted the offence. Even where (as in *Cain v Doyle*) the prosecuting authority is formally part of the Executive Government of the polity which is subject to the fine, the prosecutions are usually conducted independently of executive policy. A decision to remit a fine would be taken with an appreciation of the political cost of a finding of guilt. There will also be circumstances where, as here, the prosecuting authority is not part of the body politic responsible for the offence. Here, if a fine were able to be imposed on the body politic of the Commonwealth of Australia, it would be the Administrator of

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266 *Judiciary Act 1903* (Cth), s 2, see definition of "cause".

267 *Cain v Doyle* (1946) 72 CLR 409 at 424.

268 *Cain v Doyle* (1946) 72 CLR 409 at 418.

269 *Sentencing Act 1995* (NT), s 24.

270 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 514R, 514T, read with *National Parks and Wildlife Conservation Act 1975* (Cth), s 45.

271 Hogg, Monahan and Wright, *Liability of the Crown*, 4th ed (2011) at 441 [15.14].

272 (1946) 72 CLR 409 at 421.

273 *Cain v Doyle* (1946) 72 CLR 409 at 425.

the Northern Territory,[274] on the advice of the Executive Council of the Northern Territory,[275] who would take any decision to remit any fine that is imposed upon the body politic of the Commonwealth of Australia.

159 Fourthly, Dixon J said that the "Crown" generally "acts only by its Ministers and servants".[276] The effect of this, he said, was that if the "Crown" were criminally liable then two or more of its agents could be guilty of conspiracy by acting solely in the interests of the Commonwealth where, "knowing the facts" but unaware of the legal consequences of their actions, the agents "agree upon a course of action which constitutes or involves the offence on the part of the Crown".[277] Further, Dixon J added that a single officer might be liable as an accessory. It is unnecessary to descend into the elements of liability for conspiracy or accessory liability other than to note the serious difficulties presented by the assumption of Dixon J that a person could not be liable as an accessory to a crime for which the principal had an immunity from liability.[278]

160 More fundamentally, there are serious questions for the rule of law, and more specifically equality under the law,[279] presented by Dixon J's concern to immunise from criminal liability any agents of the body politic of the Commonwealth of Australia whose offence was committed with a belief that they were acting in the interests of the Commonwealth, but not to immunise others who acted in the same way with respect to a different employer. To the contrary, "[i]f an act is unlawful ... a person who does it can claim no protection by saying that he acted under the authority of the Crown".[280]

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274 *Fines and Penalties (Recovery) Act 2001* (NT), s 117(1).

275 *Interpretation Act 1978* (NT), s 34(1).

276 *Cain v Doyle* (1946) 72 CLR 409 at 425.

277 *Cain v Doyle* (1946) 72 CLR 409 at 425.

278 *R v Anna Rowan (a pseudonym)* (2024) 98 ALJR 508 at 523 [77]. See also *Pickett v Western Australia* (2020) 270 CLR 323 at 366 [102]; *O'Dea v Western Australia* (2022) 273 CLR 315 at 339-340 [65].

279 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 215.

280 *Clough v Leahy* (1904) 2 CLR 139 at 155-156. See also *A v Hayden* (1984) 156 CLR 532 at 580.

(iv) The lack of foundation for Dixon J's presumption

161 Perhaps with an eye to the weakness of each of the four considerations above, Dixon J said in *Cain v Doyle* that in their support for the presumption they were "only minor considerations".[281] The fundamental basis for the reasonable expectation that the body politic of the Commonwealth of Australia would not be held criminally liable, which the considerations illustrated, was said to be the "place occupied in our system by the fundamental constitutional principle ... that the Crown is not liable to be sued criminally for a wrong, and only civilly by modern statute; and that the King is not under the coercive power of the law".[282]

162 In *Cain v Doyle*, Latham CJ appeared to rely upon the English constitutional principle that the King can do no wrong as a justification to deny even the ability of the Commonwealth Parliament to legislate to impose criminal liability upon the body politic of the Commonwealth of Australia. Latham CJ referred to "the rule that the King can do no wrong", said that this principle applied *a fortiori* to criminal wrongs, and said that it "would appear to be obvious that it is impossible for the Crown in right of the Commonwealth to prosecute the Commonwealth" for a serious criminal offence.[283] The Chief Justice said that although "Ministers and officers of the Crown" could be, if the Commonwealth Parliament wished, subjected "to the penalties to which private employers are liable under the Act", this was not possible for the body politic of the Commonwealth of Australia because "the fundamental idea of the criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence".[284]

163 By contrast, and perhaps recognising the difficulty of bluntly transplanting English constitutional conceptions to Australia especially after Federation, Dixon J relied upon the English constitutional principle as the foundation for a presumption (rebuttable by clear evidence of parliamentary intention) about immunity rather than the foundation for an irrebuttable rule about the absence of any substantive duties.[285] A decade earlier, Dixon J had said in *Werrin v The Commonwealth*[286] that but for the decision of Isaacs, Rich and Starke JJ in *The*

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281 (1946) 72 CLR 409 at 425.

282 *Cain v Doyle* (1946) 72 CLR 409 at 425.

283 *Cain v Doyle* (1946) 72 CLR 409 at 417-418.

284 *Cain v Doyle* (1946) 72 CLR 409 at 418.

285 *Cain v Doyle* (1946) 72 CLR 409 at 424.

286 (1938) 59 CLR 150.

Commonwealth v New South Wales[287] (which had identified the foundation of the liability of the Commonwealth body politic in s 75 of the *Constitution*[288]) he would have "felt little or no hesitation" in concluding that the Commonwealth Parliament had "complete authority" over the cause of action for any wrong and the remedy for enforcing it.[289] In *Werrin v The Commonwealth*, Dixon J also said that he "should have thought that the right of the subject to recover from the Crown in right of the Commonwealth, whether in contract or in tort, is the creature of the law which the Federal Parliament controls".[290]

164 The view that Dixon J took in *Werrin v The Commonwealth* was one which transformed the English constitutional principle from one that supports an irrebuttable absence of substantive legal duties into one that supports only a rebuttable immunity. Dixon J said that one "traditional mode of expressing and indeed accounting for the absence of any liability on the part of the Crown for the torts of its servants has been to say that the Crown cannot be sued except by its own consent".[291] That mode of expression, as Dixon J recognised, treated the inability to bring an action against the Commonwealth as merely an immunity from liability, not as an absence of the underlying duty.[292] The body politic of the Commonwealth of Australia owes common law duties (the King *can* do wrong) but has an immunity from liability for breach of them. On that view, in Dixon J's words, the body politic of the Commonwealth of Australia owes duties but any duty is "*in abstracto* as a duty of imperfect obligation".[293] In short, the immunity is not the absence of duty but is instead "the shield of the Crown",[294] which immunises the body politic of the Commonwealth of Australia from the liability that exists for breach.

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287 (1923) 32 CLR 200.

288 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 166.

289 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 167.

290 (1938) 59 CLR 150 at 167.

291 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 167.

292 See, for instance, *Canadian Broadcasting Corporation v Attorney-General for Ontario* [1959] SCR 188 at 204.

293 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 168.

294 *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

165 In *Werrin v The Commonwealth*,[295] Dixon J recognised that this immunity conception of the liability of a body politic was supported by a decision of the Privy Council in 1887,[296] which held that the legislative grant of a general remedy against the body politic could effectively remove the "Crown immunity" that existed for its liability for wrongdoing. The removal of an immunity, rather than the creation of a new liability, must have meant that the "Crown" still had "substantive responsibility" or underlying common law duties; the "Crown immunity" meant only that the underlying common law duties were "of imperfect obligation".[297]

166 This transformation of the English constitutional principle from one that supported an absence of duty to one that supported an immunity from liability meant that after 1901 the immunity no longer existed. The effect of the conferral of jurisdiction by s 75(iii) of the *Constitution* for suits "in which the Commonwealth ... is a party" must have been a constitutional removal of any immunity of the body politic of the Commonwealth of Australia.

167 The immunity conception of the English constitutional principle, and the recognition of its removal by s 75(iii) of the *Constitution*, was applied by four members of this Court in *The Commonwealth v Mewett*[298] and has been repeatedly affirmed.[299] That established Australian principle leaves no place for the application to the body politic of the Commonwealth of Australia of the English constitutional principle that "the King can do no wrong". The "fundamental constitutional principle" upon which Dixon J's presumption depended in *Cain v Doyle*, and which provided the foundation for a reasonable expectation that legislation would not expose the body politic of the Commonwealth of Australia to criminal liability, is now firmly established as an outdated conception that should be regarded as having been inapplicable to Australia since 1901.

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295 (1938) 59 CLR 150 at 167.

296 *Farnell v Bowman* (1887) 12 App Cas 643.

297 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 168.

298 (1997) 191 CLR 471 at 551 (Gummow and Kirby JJ). See also at 491 (Brennan CJ), 531 (Gaudron J).

299 *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 157 [59]; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 57-58 [59], 83 [142]; *Blunden v The Commonwealth* (2003) 218 CLR 330 at 336 [9].

IV. Replacing the foundations of the "presumption in *Cain v Doyle*"

(i) The decision of this Court in Bropho v Western Australia

168 The issue for this Court in *Bropho v Western Australia*[300] concerned an offence provision, s 17 of the *Aboriginal Heritage Act 1972* (WA), that was expressed in general terms. The issue was whether that offence provision applied to any of: (i) the Crown (by which must have been meant the body politic of Western Australia); (ii) a statutory corporation that was created as "an agent of the Crown in right of the State" with, relevantly, the status, immunities and privileges of the body politic of Western Australia;[301] and (iii) individual employees and agents of that statutory corporation.[302]

169 This Court did not ultimately decide (i) or (ii). It was sufficient, in the appeal from a decision affirming the striking out of the appellant's statement of claim, to conclude that neither the body politic of Western Australia nor the statutory corporation had authority to authorise the individual employees and agents of the statutory corporation to commit a criminal offence by breach of s 17 of the *Aboriginal Heritage Act 1972* (WA). Nevertheless, the reasoning of the joint judgment of six members of this Court explained the principles to be applied when considering whether a body politic or a statutory corporation acting as an agent of a body politic is subject to statutory obligations and, in particular, criminal laws such as s 17 of the *Aboriginal Heritage Act 1972* (WA).

170 It is particularly telling that at the point when the joint judgment set out the terms of the "presumption in *Cain v Doyle*" (saying that "the presumption against a legislative intent [that a body politic would be 'liable to prosecution and conviction for a criminal offence'] would be extraordinarily strong"), the decision in *Cain v Doyle* was not mentioned.[303] This was no mere omission: the Court referred to copious authority and the decision in *Cain v Doyle* had been cited to the Court and was relied upon in detail by Brennan J.[304] Rather than referring to *Cain v Doyle* at the point where the joint judgment discussed the content of the "presumption in *Cain v Doyle*", the joint judgment cited a decision of the Supreme Court of Canada in which it was said, on one of the pages cited, that it was not

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300 (1990) 171 CLR 1.

301 *Western Australian Development Corporation Act 1983* (WA), s 4(3).

302 *Bropho v Western Australia* (1990) 171 CLR 1 at 14-16, 23-24.

303 *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

304 *Bropho v Western Australia* (1990) 171 CLR 1 at 3, 26.

"any longer right to say that the Queen can do no wrong, though in earlier times the immunity was so stated".[305]

171 The starting point for the relevant dispositive reasoning of the joint judgment of six members of this Court was that a rule that precluded liability of the "Crown", at least in the sense of the body politic, from arising under legislation had been treated as a "rule of statutory construction which identifies a presumption to be applied in ascertaining the relevant legislative intent".[306]

172 Their Honours thought that the rule "presents no real problem of principle" in so far as the presumption applied to "the actual person of the Sovereign"; in other words, their Honours were unconcerned with the application of the presumption to the body politic of the Commonwealth of Australia.[307] But the joint judgment expressed two concerns about the presumption. The first concern was the extension of the presumption "to confer prima facie immunity in relation to the activities of governmental instrumentalities or agents acting in the course of their functions or duties as such".[308] The second concern was the inflexibility of an approach which permits the presumption to be rebutted only if an intention to bind the body politic is stated in express terms or "manifest from the very terms of the statute", with the purpose of the statute only taken into account where the purpose would be "'wholly frustrated' unless the Crown is bound".[309]

173 One reason for the first concern—extension of the presumption beyond bodies politic—expressed by the joint judgment in *Bropho v Western Australia* was that such extensions may "offend notions of parity".[310] For instance, why should the agent or employee of the body politic be treated differently in terms of liability from the agent or employee of any other legal person?

174 Nevertheless, the joint judgment in *Bropho v Western Australia* regarded consistent recognition of the extension of the presumption beyond the body politic

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305 *Canadian Broadcasting Corporation v Attorney-General for Ontario* [1959] SCR 188 at 204.

306 *Bropho v Western Australia* (1990) 171 CLR 1 at 15. See, for instance, *The Commonwealth v Rhind* (1966) 119 CLR 584 at 598; *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 especially at 216-217.

307 *Bropho v Western Australia* (1990) 171 CLR 1 at 15.

308 *Bropho v Western Australia* (1990) 171 CLR 1 at 15-16.

309 *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

310 (1990) 171 CLR 1 at 16.

as having created a "firm factual foundation" for that extension.[311] In other words, notwithstanding legal concern about the lack of parity created by a rule that supports indemnity for one class of officers, employees and other agents because they act for the body politic, the extension of the presumption could be supported by its continued and consistent public recognition.

175 The concern about parity was more substantially ameliorated by their Honours' answer to their second concern, namely their concern about the inflexibility of application of the presumption. The inflexible application of the presumption in the past was replaced by a flexible application so that the strength of the presumption would depend upon "the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises".[312]

(ii) The effect of the decision in Bropho v Western Australia

176 Strictly, that which might previously have been called a "presumption", whether as the "presumption in *Cain v Doyle*" or the "presumption in *Bropho v Western Australia* ", might better now be described simply as an inference. It is an enquiry into whether, in all the circumstances, an inference of immunity should be drawn where there is no express provision in favour of or against that immunity. Some circumstances might mean that the likelihood of the inference being drawn is very weak. Other circumstances might mean that the likelihood of the inference being drawn is very strong. In every case, the language of "presumption" may be unhelpful because the inference always depends on all of the circumstances.[313] The better description of the "presumption in *Cain v Doyle*" or the "presumption in *Bropho v Western Australia*" is simply "an inference of immunity from liability of the body politic or its officers, employees, or other agents". The "presumption" is nothing more than a statutory implication of immunity from the particular liability sought.

(1) Immunity of a body politic

177 One circumstance in which the inference of immunity from liability will usually be drawn, described by the joint judgment in *Bropho v Western Australia* as a circumstance where the presumption of legislative intention of immunity from liability "would be extraordinarily strong",[314] is where the body that would hold

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311 (1990) 171 CLR 1 at 16.

312 *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

313 See *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 at 74-75 [102].

314 (1990) 171 CLR 1 at 23.

the immunity is a body politic and the subject matter of the immunity is a liability for criminal punishment. Any criminal liability of the body politic in such circumstances could only arise by attribution of the liability or the conduct of its officers, employees or other agents to the body politic. In such circumstances an inference of an intention by a Parliament to confer immunity on the body politic from criminal liability has consistently been reaffirmed as one that would be likely to be drawn.[315]

178 Despite this consistent stream of authority, it may no longer be easy to see why there should be such a strong inference of immunity from criminal liability for a body politic for the attributed acts or liabilities of its officers, employees or other agents, but no immunity for any other body to whom the same acts or liabilities might be attributed. Putting to one side the different issues of immunity of a sovereign State in the courts of another State, the most common justification for the unique approach to a body politic, which does not suffer from the same flaws as the justifications expressed by Dixon J in *Cain v Doyle*, was expressed by Story J in *United States v Hoar*:[316]

> "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself."

179 In short, the justification seems to be that a body politic, acting through its legislative arm (and through its judicial arm), creates rules of conduct with consequences for members of the public and legal persons generally but not for itself: the body politic is a rule-maker not a rule-taker. It might be doubted whether there remains any consistent public recognition of this view. But whether or not that justification can withstand scrutiny in relation to a body politic, it cannot justify the ready drawing of the same inference of an immunity from criminal liability for those officers, employees or other agents who act on behalf of the body

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315 See *Jacobsen v Rogers* (1995) 182 CLR 572 at 587; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 269-270; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 472; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 75 [22]; *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 636 [14]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 380-381 [164]-[165]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 470 [108].

316 (1821) 26 Fed Cas 329 at 330. See also *Attorney-General v Donaldson* (1842) 10 M & W 117 at 123-124 [152 ER 406 at 408-409]; *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 122-123; *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

politic. Attempts to do so[317] are wrong because these agents are not the rule-makers.

180 Most importantly, the context of the legislation might nevertheless preclude an inference that a body politic is immune from criminal liability. It has been observed that legislation now concerns "a vast number of public welfare measures that are supported by penal sanctions ... occupational health and safety, the cleanliness of the environment, the purity of food and drugs, the quality of manufactured products, building standards, rent control" and that "[t]he expansion of governmental activity has made the Crown a factory owner, manufacturer, builder, landlord and many other things besides".[318] In that context, the 2011 guide to Commonwealth drafters provided that "[l]egislation expressed to bind the Crown does not usually impose criminal liability on the Crown" but also said that "[o]ccupational health and safety legislation is an example of an exception".[319] The same year, in the Explanatory Memorandum to the *Work Health and Safety Bill 2011* (Cth) it was said that a national review had "recognised that it is now widely accepted that the Crown should not be exempt from the operation of the offence provisions of OHS legislation".[320]

(2) Immunity of officers, employees and other agents of a body politic

181 On the other hand, a circumstance where the inference of immunity from liability will rarely be drawn—where the presumption has been described as "little more than the starting point" to ascertain legislative intention[321] or as a matter of "weak operation"[322]—is where the subject of the immunity is the officers, employees or other agents (including statutory corporations) of a body politic. Indeed, in the circumstances described by the joint judgment in *Bropho v Western Australia* (the application to "employees of a governmental corporation engaged in commercial and developmental activities" of legislation that protects places or

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317 See *Roberts v Ahern* (1904) 1 CLR 406 at 418; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [35].

318 Hogg, Monahan and Wright, *Liability of the Crown*, 4th ed (2011) at 440 [15.14].

319 Commonwealth of Australia, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) at 33-34 [2.4.3].

320 Australia, House of Representatives, Work Health and Safety Bill 2011, Explanatory Memorandum at 12 [49].

321 *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

322 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 445. See also *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 451-452 [52].

objects which are "of vital significance to a particular section of the community"), it may even be misleading to say that there is a presumption that is "little more than a starting point".[323] Since there is a strong likelihood of an inference of an *absence* of immunity, the very language of a "presumption" can "divert attention from the need to formulate legislative intent".[324]

182 Indeed, provisions such as s 64 of the *Judiciary Act 1903* (Cth) reinforce the reasonable expectation of the public of an equality of treatment on the "not infrequent occasions"[325] where officers, employees or other agents of a body politic are engaged in the work of the Executive Government concerning commercial or developmental activities, "such as are engaged in by the Crown and its subjects alike".[326]

183 Further, in relation to breaches of the criminal law by employees acting with authority in the course of their duties for a body politic, "it simply would not occur to any legislature of this country" that in the absence of any express words or necessary implication in legislation, the employees would be "placed beyond the reach of the ordinary criminal law".[327] The intention of Parliament is today unlikely to be taken to involve the conferral of an immunity from the operation of general criminal provisions upon conduct by officers, employees or other agents acting with authority in the course of their duties for a body politic.[328]

184 In relation to statutory corporations, even prior to *Bropho v Western Australia*, in *Townsville Hospitals Board v Townsville City Council*,[329] Gibbs CJ, with whom the other members of this Court agreed, appeared to reject the existence of an extension of the presumption for the reason of parity, saying that "[a]ll persons should prima facie be regarded as equal before the law, and no statutory

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323 (1990) 171 CLR 1 at 23.

324 *Bropho v Western Australia* (1990) 171 CLR 1 at 21.

325 *Bropho v Western Australia* (1990) 171 CLR 1 at 21.

326 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 445.

327 *Bropho v Western Australia* (1990) 171 CLR 1 at 21. See *A v Hayden* (1984) 156 CLR 532.

328 *Bropho v Western Australia* (1990) 171 CLR 1 at 28. Compare *Roberts v Ahern* (1904) 1 CLR 406.

329 (1982) 149 CLR 282 at 291.

body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them".

185 The unlikelihood of an implied immunity from liability for statutory corporations can also be seen at the Commonwealth level in changes since the 1998 Parliamentary Counsel Drafting Direction, which was published after *Bropho v Western Australia*. The 1998 Direction recognised that all the circumstances, particularly ministerial control, would be relevant to determine whether a statutory body was within the "shield of the Crown" but assumed that the inference of "Crown immunity" would usually be drawn, saying that "specific provision" may be desirable if a statutory body is "not to operate under the shield of the Crown".[330] But, in 2011, it was said of the inference of immunity from criminal liability that "immunity from criminal responsibility does not extend to Crown servants" and "[m]ost of the Commonwealth's trading and business activities are carried on by [government business] enterprises, which can be held criminally responsible for unlawful conduct".[331] And, in 2023, it was said of the inference of immunity that "generally speaking, a corporate Commonwealth entity should not be entitled to the privileges and immunities of the Crown. Specific policy authority is required for departures from this general approach."[332]

(3) The ultimate question: the intention of the Parliament that enacts the offence or other rule

186 For the reasons set out above, every case requires consideration of the context and all the circumstances. The broad statements expressed above about the unlikelihood of an inference of implied immunity from particular liability for members of the Executive Government or statutory corporations were based on an assumption of a close analogy between (i) the activities or offending conduct of those persons and (ii) the same activities or offending conduct of the general public. But the more unique the exercise of liberty or power is to the Executive Government, and the less analogous that conduct is with that of any member of the public,[333] the more confidence there might be that liability that is expressed in

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330 Commonwealth of Australia, *Parliamentary Counsel Drafting Direction No 1* (1998) at [29]-[31].

331 Commonwealth of Australia, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) at 34 [2.4.3].

332 Commonwealth of Australia, *Parliamentary Counsel Drafting Direction No 3.6: Commonwealth bodies* (2023) at [288].

333 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at 243-244 [132]-[134]; 408 ALR 381 at 415-416.

general terms is not to be taken to be intended to extend to those unique activities. Importantly, any inference of implied immunity from a general law is an inference that is concerned with the intention taken to be held by the Parliament that enacts the general law.

187 The Attorney-General of the Commonwealth submitted that an implied immunity will arise if the Parliament of a different body politic—the one that creates the statutory corporation—is taken to have an intention that the statutory corporation will have the same legal status as the body politic. That submission focuses upon the intention of the wrong Parliament. Although the functions and powers of the statutory corporation are important in determining whether an immunity is intended to exist, the question of whether legislation impliedly confers immunity from an offence or obligation can only be answered by reference to what is taken to be the intention of the Parliament that creates the relevant offence or obligation. The question is whether the Parliament that created the *offence or obligation* conferred an implied immunity upon the statutory corporation from liability for that offence or obligation.

188 The authority upon which the Attorney-General of the Commonwealth relied is consistent with this conclusion. In *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[334] one issue was whether a New South Wales statutory corporation, the State Authorities Superannuation Board ("the Board"), was immune from the provisions of the *Stamp Act 1921* (WA). The Board was created by New South Wales legislation as "a statutory body representing the Crown",[335] where "the Crown" meant the body politic of New South Wales. It was argued that the Western Australian legislature did not intend to bind the body politic of New South Wales and that the Board was the "State" in that sense.[336] In a joint judgment, Brennan CJ, Dawson, Toohey and Gaudron JJ held that, apart from criminal liability in s 39(1a), the *Stamp Act 1921* (WA) was intended to bind bodies politic. It was therefore unnecessary to decide whether the Board "was" the body politic of New South Wales "for the purpose of determining liability for the payment of stamp duty under the *Stamp Act*".[337] Nevertheless, it was assumed that any determination of whether the Board was to be treated in the same way as the body politic of New South Wales was a matter for the Parliament that enacted the *Stamp Act 1921* (WA), not for the Parliament that enacted the

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334 (1996) 189 CLR 253.

335 *Superannuation Administration Act 1987* (NSW), s 4(2).

336 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 256.

337 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270.

legislation that created the Board. The same approach was taken by McHugh and Gummow JJ when they spoke of the classification of the Board as a State "for this purpose".[338]

V. The post-*Bropho v Western Australia* application of *Cain v Doyle*

(i) Near-consistent recognition of a single approach

189 With two possible exceptions, the judgments in this Court since *Bropho v Western Australia* that have considered the "presumption in *Cain v Doyle*" have treated that presumption as subsumed within the approach taken by this Court in *Bropho v Western Australia*.

190 One example is the decision of this Court in *Jacobsen v Rogers*.[339] An issue in that case was whether the body politic of Western Australia was subject to a Commonwealth legislative power to grant a search warrant. The decision in *Cain v Doyle* was cited in a joint judgment of five members of this Court for a proposition about the exceptional nature of criminal liability of a body politic in the course of an extended discussion of the decision in *Bropho v Western Australia*.[340]

191 The discussion in the joint judgment in *Jacobsen v Rogers* commenced by referring to the presumption, attributed to *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[341] and explained in *Bropho v Western Australia*, that a Commonwealth statute does not intend to bind "the Crown" in right of the various States.[342] After observing that the "servants and agents" of the Crown "have no immunity from the ordinary criminal law", their Honours also observed, relying on *Cain v Doyle*, that "[t]he Crown itself may not be subjected to criminal liability, save in the most exceptional circumstances".[343] Their conclusion was that the legislation applied to premises owned by "the Crown in right of Western Australia".[344] The presumption of immunity of the body politic of Western

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338 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 294.

339 (1995) 182 CLR 572.

340 *Jacobsen v Rogers* (1995) 182 CLR 572 at 587.

341 (1979) 145 CLR 107.

342 *Jacobsen v Rogers* (1995) 182 CLR 572 at 585.

343 *Jacobsen v Rogers* (1995) 182 CLR 572 at 587.

344 *Jacobsen v Rogers* (1995) 182 CLR 572 at 585, 588.

Australia had less strength than in other circumstances, due to the impairment of the body politic's interest in the administration of justice that would arise if investigating agencies were powerless in relation to "Crown premises or Crown property".[345]

192 A second example is the decision of this Court in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*.[346] In that case, in the course of considering the lack of immunity of some State bodies politic from various provisions of the *Trade Practices Act 1974* (Cth), five members of this Court relied upon the decision in *Bropho v Western Australia*.[347] They did so in the context of considering provisions which attracted pecuniary penalties and drew an analogy with circumstances involving the commission of an offence.[348] There was no suggestion that in the same or related circumstances the presumption enunciated in *Bropho v Western Australia* should be replaced by a separate "presumption in *Cain v Doyle*".

193 A third example, although one that is not as clear, is the decision of this Court in *Telstra Corporation Ltd v Worthing*.[349] In that case, this Court considered whether New South Wales workers' compensation legislation applied to a Commonwealth statutory corporation created under the *Telecommunications Act 1975* (Cth). In a joint judgment, the Court held that the Commonwealth statutory corporation was not immune from the civil effects upon it as an "employer" under the New South Wales legislation.[350] The Court then turned to the criminal liability of the statutory corporation.

194 The starting point for the assessment of whether the statutory corporation was immune from criminal liability was whether the body politic of the Commonwealth of Australia was subject to criminal liability. If the body politic of the Commonwealth of Australia was not subject to criminal liability, then s 109 of the *Constitution* would invalidate the provision in the New South Wales workers' compensation legislation imposing criminal liability upon the Commonwealth statutory corporation. The reason s 109 of the *Constitution* would have this effect

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345 *Jacobsen v Rogers* (1995) 182 CLR 572 at 587-588.

346 (2007) 232 CLR 1.

347 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 26-28 [36]-[42].

348 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 28 [44].

349 (1999) 197 CLR 61.

350 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 74 [18].

was due to s 21(3) of the *Telecommunications Act 1975* (Cth), which provided that the statutory corporation was not subject to any liability under State legislation to which the Commonwealth was not subject.[351]

195 The Court held that the body politic of the Commonwealth of Australia was generally immune from criminal liability, saying that it would "require the clearest indication of a legislative purpose to demonstrate that [the relevant penal] provisions attach to the Commonwealth".[352] That proposition was materially identical to the point made by the joint judgment in *Bropho v Western Australia* that a presumption of legislative intention to confer immunity from liability "would be extraordinarily strong"[353] where the body that would hold the immunity is a body politic and the subject matter of the immunity is a liability for criminal punishment. The authorities in the footnote supporting the proposition in *Telstra Corporation Ltd v Worthing* included a reference to the decision of Dixon J in *Cain v Doyle*, as well as the joint judgment of McHugh and Gummow JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*,[354] who said that the "presumption in *Cain v Doyle*" was the "same presumption" as was "said to apply where a statute has conferred the immunity of the Crown upon a body or corporation". Unfortunately, the same footnote also referred to the joint judgment of four other Justices in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*,[355] which, as explained below, appeared to treat the "presumption in *Cain v Doyle*" as though it retained an independent existence from the presumption in *Bropho v Western Australia*.

196 A fourth example is the decision of this Court in *Wurridjal v The Commonwealth*,[356] where Gummow and Hayne JJ considered the scope of operation of the offence in s 69 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) of entering or remaining on land that is a sacred site. Their Honours referred to both the judgment of Dixon J in *Cain v Doyle* and the decision of this Court in *Telstra Corporation Ltd v Worthing* for the proposition, again in effectively the same terms as the point made by the joint judgment in *Bropho v*

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351 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 74 [19], 75 [23]-[25].

352 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 75 [22].

353 (1990) 171 CLR 1 at 23.

354 (1996) 189 CLR 253 at 277, referring to *Bolwell v Australian Telecommunications Commission* (1982) 42 ALR 235 at 241, where *Cain v Doyle* was relied upon alongside *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 and *The Commonwealth v Rhind* (1966) 119 CLR 584.

355 (1996) 189 CLR 253 at 270.

356 (2009) 237 CLR 309.

Western Australia, that "it would require the clearest indication of legislative purpose to demonstrate that such a penal provision attached to the Commonwealth as a body politic".[357] Their Honours held that there was no such indication in s 69 but that the prohibition would apply to "officers of the Commonwealth and other parties".[358]

197 The first possible exception to the consistent approach in this Court of treating the "presumption in *Bropho v Western Australia*" as based on the same principles as the "presumption in *Cain v Doyle*" is the reasoning of Brennan CJ in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*.[359] In that case, his Honour appeared to deny the existence of any presumption at all, developing the view that he had expressed in his separate reasons in *Bropho v Western Australia*.[360]

198 As to the absence of any presumption of immunity of the body politic of the Commonwealth of Australia, Brennan CJ said that "[w]hen the Crown in right of the Commonwealth enters into a transaction governed by State law, it is 'bound' in the sense that the rights it acquires or the obligations it assumes by entering into the transaction are those prescribed by or pursuant to the State law".[361] And, without adverting to the possibility of attribution of the conduct of its officers, servants or other agents to the body politic of the Commonwealth of Australia, his Honour thought it "meaningless" to speak of the body politic (which he described simply as "the Crown") "being 'bound' by State criminal laws which either prescribe duties to be performed under penalty or prohibit conduct of a prescribed kind".[362] Officers, servants or other agents would themselves be criminally liable unless their actions were authorised by a Commonwealth statute, in which case the

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357 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 380-381 [164].

358 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 380-381 [164]-[165].

359 (1997) 190 CLR 410.

360 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427.

361 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427.

362 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427.

criminal liability provision would be inoperative due to the operation of s 109 of the *Constitution*.[363]

199 Whether or not a presumption of immunity needed to be overcome, it is not correct to say that it is meaningless for a body politic to have attributed to it the conduct of its officers, employees or other agents. Whether that conduct is attributed for the purposes of civil or criminal liability, there can be real consequences for others that arise from a finding of liability of a body politic. As explained above, the facts of *Cain v Doyle* itself revealed such consequences. Nevertheless, no party or intervener sought to agitate those issues on this appeal and it is unnecessary to consider them. The view of Brennan CJ can be put to one side.

200 The second possible exception is the reasoning of Brennan CJ, Dawson, Toohey and Gaudron JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*,[364] where their Honours said that "[a]n intention that the Crown should not be bound by [s 39(1a) of the *Stamp Act 1921* (WA)] is manifested, not by the application of a presumption of the kind discussed in *Bropho*, but by a different presumption based upon the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty". Their Honours then quoted from the reasons of Dixon J in *Cain v Doyle* concerning the strength of a presumption that would impose liability of a criminal nature on a body politic.

201 The difficulty with this reasoning in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* is that their Honours were not considering the application of the offence provision in s 39(1a) of the *Stamp Act 1921* (WA) to a body politic. They were considering the application of that offence provision to a statutory body. If the "presumption in *Cain v Doyle*" were separate from the "presumption in *Bropho v Western Australia*" then the consideration of s 39(1a) was concerned with the latter, not the former. The more accurate characterisation of the "presumption" in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*, consistent with all the authorities discussed above, was that of McHugh and Gummow JJ, who said that it was the "same presumption" recognised in *Cain v Doyle* that was "said to apply where a statute has conferred the immunity of the Crown upon a body or corporation".[365]

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363 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427.

364 (1996) 189 CLR 253 at 270.

365 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 277.

(ii) No inconsistency in authority

202 Substantial submissions were made about an apparent conflict between, on the one hand, the remarks by McHugh and Gummow JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* and, on the other hand, the remarks of Gibbs CJ (with whom the other members of this Court agreed) in *Townsville Hospitals Board v Townsville City Council*.[366] The concerns of Gibbs CJ were echoed in the joint judgment in *Bropho v Western Australia*.[367]

203 On the one hand, the remarks of McHugh and Gummow JJ suggested that it was the "same presumption" recognised in *Cain v Doyle* that was "said to apply where a statute has conferred the immunity of the Crown upon a body or corporation".[368] On the other hand, the remarks of Gibbs CJ suggested that the principle of parity meant that a statutory body, and by extension a natural person, should not be given immunity unless that clearly appeared to be the intention of the legislature.[369]

204 Properly understood, there is no conflict between these statements. An inference that Parliament intended to confer immunity upon a statutory body is, indeed, the "same presumption" as that recognised in *Cain v Doyle*. But the force of that inference will depend upon all the circumstances. And one circumstance that can militate against drawing the inference will be that the subject of the immunity is not a body politic, but is a statutory corporation or a natural person.

VI. Can an inference of immunity from criminal liability for the DNP be drawn from ss 4 and 34 of the Sacred Sites Act?

(i) The Sacred Sites Act

205 In 1989, the Sacred Sites Act replaced the *Aboriginal Sacred Sites Ordinance 1978* (NT),[370] which had been one of the earliest enactments of the Legislative Assembly of the Northern Territory after self-government. The Sacred Sites Act created an expert body, the AAPA, with functions including the

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366 (1982) 149 CLR 282 at 291. See also *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 651 [8], 656 [26].

367 (1990) 171 CLR 1 at 16.

368 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 277.

369 *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 291-292.

370 See *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 50.

enforcement of the Sacred Sites Act,[371] and (as explained in the long title) sought "to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement". This title was described as "an acknowledgement not only of this government's commitment to the recognition of Aboriginal tradition but also of its recognition of the aspirations of all Territorians for social, cultural and economic advancement and of the need to balance often competing interests".[372]

206 The Sacred Sites Act is divided into Parts. Part I defines a "sacred site" as having the same meaning as in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which is "a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition".[373] Part II establishes the AAPA, regulates its operation, and confers functions and powers upon it.

207 Part III of the Sacred Sites Act is concerned with the procedure for protection of sacred sites. By s 19B, any person who proposes to carry out work on land can apply for an Authority Certificate from the AAPA. By s 19F, the AAPA will consult with the custodians of the sacred site on or in the vicinity of the land to which the application relates before issuing the Authority Certificate. By s 19G, the applicant for an Authority Certificate can request a conference with the custodians. The AAPA, by s 22, shall only issue an Authority Certificate (with any conditions) where "the work or use of the land could proceed or be made without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land" or "an agreement has been reached between the custodians and the applicant". Sections 30-32 provide for a procedure by which an applicant under s 19B who is aggrieved by a decision of the AAPA can apply to the Minister for a Minister's Certificate that sets out conditions, if any, on which work may be carried out on or use made of land comprised in a sacred site or on which a sacred site is situated.

208 Part IV of the Sacred Sites Act is concerned with offences, penalties and procedures. It contains, in s 34, the offence with which this appeal is concerned,

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371 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 10(k).

372 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 October 1988 at 4488.

373 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 3 (definition of "sacred site"), read with *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 3(1) (definition of "sacred site").

namely carrying out work on a sacred site, with a defence that the work was carried out with, and in accordance with the conditions of, an Authority Certificate or a Minister's Certificate. The work carried out by the DNP was done without the permission of an Authority Certificate or a Minister's Certificate.

(ii) The question of interpretation

209 The question of whether the Legislative Assembly of the Northern Territory should be taken to have intended to impose criminal liability on the DNP requires consideration of ss 4 and 34 of the Sacred Sites Act. Section 34 of the Sacred Sites Act provides as follows:

> "**Work on sacred site**
>
> (1) A person shall not carry out work on or use a sacred site.
>
> Maximum penalty: In the case of a natural person—400 penalty units or imprisonment for 2 years.
>
> In the case of a body corporate—2 000 penalty units.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, an Authority Certificate or a Minister's Certificate permitting the defendant to do so."

210 It was accepted by all parties on this appeal that the Commonwealth as a body politic was a "person" and was bound by the obligation created by s 34(1),[374] just as in *Cain v Doyle* the Commonwealth was bound by s 18(1) of the *Re-establishment and Employment Act 1945* (Cth). Remedies such as an injunction, mandamus, or declaration against the Commonwealth might have been available.

211 The dispute on this appeal arose from the proposed interpretation of the Attorney-General of the Commonwealth that although the DNP was a body corporate and (on the face of s 34(1)) apparently liable for a penalty of up to 2,000 penalty units, the DNP should be treated as having the same legal status as the body politic of the Commonwealth of Australia and both legal entities should be immune from criminal liability. That proposed interpretation of s 34(1) of the Sacred Sites Act requires consideration of s 4 of the Sacred Sites Act.

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374 See *Interpretation Act 1978* (NT), s 24AA(1).

(iii) The legislative history of s 4 of the Sacred Sites Act

212 In its original form, s 4 of the Sacred Sites Act provided as follows: "This 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." In this original form, s 4 was intended to bind not only the body politic of the Northern Territory, but also every other Australian body politic.

213 On 20 October 2005, the Legislative Assembly of the Northern Territory introduced the *Northern Territory Aboriginal Sacred Sites Amendment Bill 2005* (NT) ("the Bill"). By cl 4, the Bill sought to repeal the original s 4 and to substitute it with a version of s 4 that provided:

> "(1) This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.
>
> (2) If the Crown in any of its capacities commits an offence against this Act, the Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.
>
> (3) This section does not affect any liability of an officer, employee or agent of the Crown to be prosecuted for an offence.
>
> (4) In this section—
>
> 'Crown' includes—
>
> (a) an Agency; and
>
> (b) an authority or instrumentality of the Crown."

214 During the course of debate on the Bill, on 1 December 2005 the Government invited the defeat of cl 4. A new version of cl 4, which was in narrower terms than the defeated cl 4, was introduced and passed on that day.[375] The new s 4 of the Sacred Sites Act, following the passage of the *Northern Territory Aboriginal Sacred Sites Amendment Act 2005* (NT) ("the Amending Act"), provides as follows:

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375 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1352.

"**Act binds Crown**

(1) This Act binds the Territory Crown and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

(2) If the Territory Crown in any of its capacities commits an offence against this Act, the Territory Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.

(3) This section does not affect any liability of an officer, employee or agent of the Territory Crown to be prosecuted for an offence.

(4) In this section:

Territory Crown means the Crown in right of the Territory and includes:

(a) an Agency; and

(b) an authority or instrumentality of the Territory Crown."

215 An "Agency" is defined in s 18A(1) of the *Interpretation Act 1978* (NT) as "a department or unit of a department, or other authority or body: (a) nominated as an Agency in an Administrative Arrangements Order; or (b) declared by an Act to be an Agency for the *Public Sector Employment and Management Act 1993* or the *Financial Management Act 1995*".

216 Four points should be made about this legislative history in context.

(1) An intention to ensure that a body politic can be prosecuted

217 Prior to the proposals in the Bill as introduced and the Amending Act as passed, no Australian body politic was exposed to criminal liability for a breach of s 34(1) of the Sacred Sites Act. The original form of s 4 sought to bind "the Crown" in all of its capacities, which subjected the bodies politic of both the Northern Territory and the Commonwealth to the obligation in s 34(1). But the penalties in s 34(1) were imposed only for natural persons and bodies corporate. Bodies politic were not liable for any penalty.

218 The Bill as introduced sought to impose criminal liability for breach of provisions such as s 34(1) on either of the bodies politic of the Commonwealth or the Northern Territory. Such a body politic would be treated "as if it were a body

corporate".[376] Therefore, under the Bill as introduced, these bodies politic would fall within the penalty provisions of s 34(1). The Amending Act as passed permitted only the prosecution of the body politic of the Northern Territory "as if it were a body corporate".[377]

(2) No intention to expose the body politic of the Commonwealth of Australia to criminal liability

219 There was a change between, on the one hand, the original form of cl 4 of the Bill as introduced and, on the other hand, s 4 of the Amending Act as passed. That significant change was from referring to the "Crown" in the original cll 4(2), 4(3) and 4(4) of the Bill as introduced to referring only to the "Territory Crown" in ss 4(2), 4(3) and 4(4) of the Amending Act as passed in relation to criminal liability. The reason for that change was explained in the second reading speech and subsequent debate of the Bill. It was a concern about imposing criminal liability on the body politic of the Commonwealth of Australia.

220 During the debate of the Bill, the Attorney-General for the Northern Territory said[378]:

> "On the question of whether the amendment is able to bind the Crown or the Northern Territory government, there has been further information sought on this from the Solicitor-General. I will not share that with the House; I will leave that to the minister carrying the next stage of the debate. Certainly, the Solicitor-General has clarified the situation between the two governments."

221 The reference to the two governments appears to be to the Executive Governments of the Northern Territory and the Commonwealth of Australia. As foreshadowed by the Attorney-General for the Northern Territory during the debate, the Assistant to the Chief Minister on Indigenous Affairs added:[379]

> "I also want to talk about the liability of the Crown. The *Northern Territory Aboriginal Sacred Sites Act* already binds the Crown but, in this case, the law is not always clear. I am aware that we are going to invite the defeat of

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376 *Northern Territory Aboriginal Sacred Sites Amendment Bill 2005* (NT), cl 4. See also *Interpretation Act 1978* (NT), s 38B; *Criminal Code* (NT), s 43BK.

377 *Northern Territory Aboriginal Sacred Sites Amendment Act 2005* (NT), s 4.

378 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1349.

379 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1351.

> section 4, that part that applies to the Commonwealth, and we will give an explanation about that later."

(3) An intention to ensure broad exposure to criminal liability for the body politic of the Northern Territory

222 Another matter that can be seen from this legislative history is the express provision in s 4(2), when read with s 4(4), that criminal offences can be committed by the body politic of the Northern Territory, not merely by the commission of criminal offences by those acting on its behalf, but also by criminal offences of "an Agency" and "an authority" or "instrumentality" of "the Territory Crown". The inclusive part of the definition in s 4(4) extends the liability of the body politic of the Northern Territory to criminal offences that are notionally committed by unincorporated bodies that are departments or units of a department of government.[380]

223 For instance, whether work is performed for an agency of the Northern Territory Executive Government by unknown people, or by independent contractors, or whether it is performed by a statutory corporation that might be said to be controlled by the Northern Territory Executive Government, in every case the body politic of the Northern Territory will be criminally liable because the agency, authority or instrumentality (whether incorporated or not) will be criminally liable.

224 The reason for the provisions in ss 4(2) and 4(4) to ensure that the body politic of the Northern Territory was subject to criminal liability based upon the attribution to it of the actions or liability of any other body, whether incorporated or unincorporated, was given during the second reading speech of the Bill, when the Minister for Local Government said:[381]

> "In recent cases of alleged site damage by the government agencies or authorities, it has become apparent that there is a lack of clarity in the liability of the Crown to be prosecuted for breaches of the *Northern Territory Aboriginal Sacred Sites Act*, or accordingly, some prosecutions have not been pursued despite sufficient evidence.
>
> The inability to prosecute the Crown for sacred site damage and thus seek a form of reparation is a source of dissatisfaction amongst both authority members and the Aboriginal custodians.

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380 *Interpretation Act 1978* (NT), s 18A.

381 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2005 at 1062-1063.

> The bill provides an appropriate capacity to prosecute the Crown by clarifying that:
>
> - if the Crown in any of its capacities commits an offence against the *Northern Territory Aboriginal Sacred Sites Act*, then it is liable in that capacity;
>
> - the 'Crown' includes agencies, authorities and instrumentalities of the Crown; and
>
> - the existing liability of an officer, employee or agent of the Crown to be prosecuted for an offence is not affected."

225 These matters were reiterated during subsequent debate of the Bill, where the Attorney-General for the Northern Territory said[382]:

> "The *Northern Territory Aboriginal Sacred Sites Act* currently binds the Crown but, in case law, this is not always clear. Case law would indicate that individual employees and agents of the Crown are liable to prosecution already. This is made clear in the amendment. However, this amendment also intends to make it clear that agencies and authorities are liable for prosecution as well."

226 During the debate, the Assistant to the Chief Minister on Indigenous Affairs added:[383]

> "This amendment also intends to make it clear that agencies and authorities are liable to prosecution as well, and that is what did not occur in the previous act ... It is sad to say that some [of] the government agencies have been helpless in certain circumstances. Normally, those sorts of things arise in regards to authority certificates. Essentially, what this amendment is trying to do is to ensure that, for instance, if a government agency or a government department deliberately, knowingly damages a particular site, then they too will be responsible, just as are other citizens of the Northern Territory. That is the new amendment that applies in this particular area."

227 In light of the terms of s 4, the references to prosecutions of agencies and authorities must mean prosecutions of the body politic of the Northern Territory based on the conduct of those agencies and authorities.

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382 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1349.

383 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1351.

(4) An intention to leave unaffected all criminal liability for non-bodies politic

228 The primary submission by the Attorney-General of the Commonwealth was that s 4 contained a negative implication that immunised from criminal liability both the body politic of the Commonwealth of Australia and any other body that Commonwealth legislation treated as having the same status as the body politic of the Commonwealth of Australia. That submission should not be accepted.

229 As the extracts from the second reading speeches and debates above illustrate, the focus of the amendments to s 4, in their effect on the body politic of the Northern Territory, was to ensure the broadest possible scope for application of the criminal provisions for infringements that might be attributed to the body politic of the Northern Territory. The concern of s 4(3) is to confirm that the separate liability of any legal person is unaffected by this broad exposure to liability of the body politic of the Northern Territory.

230 Section 4(3) is concerned with particular liabilities *other than* those of the body politic of the Northern Territory. Contrary to the submission of the Attorney-General of the Commonwealth, s 4(3) is not concerned only with natural persons. Its plain terms extend to all statutory corporations which act as officers, employees or other agents of the body politic of the Northern Territory. In other words, the purpose of s 4(3) is to ensure that the amendments made to s 4 affect only the position of the body politic of the Northern Territory. No change is made to the individual liability of every legal person that is separate from the body politic of the Northern Territory even if related to that body politic as an officer, employee or other agent. By s 4(3), it is confirmed that the existing *individual* liability of any officers, employees and other agents that arises in the course of their actions for the body politic of the Northern Territory is preserved.

(iv) No basis to read down s 34 of the Sacred Sites Act

231 For the reasons above, the amendments to s 4 of the Sacred Sites Act did not affect the criminal liability under any provision of the Sacred Sites Act of any legal entity that is not a body politic. Since the DNP is a body corporate, on the plain terms of s 34 of the Sacred Sites Act the DNP is exposed to criminal liability under s 34.

232 The Attorney-General of the Commonwealth, relying in the alternative upon the decision in *Cain v Doyle*, sought to read down s 34 so that it excluded the DNP. The Attorney-General submitted that the "presumption in *Cain v Doyle*" had the effect that the body politic of the Commonwealth of Australia was immune from criminal liability under s 34 and that the same immunity extended to the DNP because it was created by the Commonwealth Parliament with the intention that it have the same legal status as the body politic of the Commonwealth of Australia.

233 That submission should not be accepted. As explained above, the decision in *Cain v Doyle* should be understood merely as one circumstance, namely criminal liability of a body politic, in which the Parliament that created the offence is likely to be taken to have intended to confer immunity. The DNP is not a body politic. And the question to be asked in respect of the DNP is whether the Legislative Assembly of the Northern Territory (not the Commonwealth Parliament) intended to confer an immunity on a body corporate like the DNP when enacting the Sacred Sites Act and its amendments.

234 The Attorney-General of the Commonwealth relied upon a passage from a judgment of Gleeson CJ and Gaudron J to submit that the DNP fell within a class of "government instrumentalities and authorities intended to have the same legal status as the executive government".[384] In other words, any actions by the DNP should attract the same consequences as if they were the actions of officers, employees or other agents of the body politic of the Commonwealth of Australia.

235 That submission of the Attorney-General can be accepted for the purposes of this appeal without descending into the detail of the EPBC Act to ascertain whether the DNP is sufficiently independent of the Executive Government such that the better analogy would be to a private body corporate. The submission can be assumed to be correct because, even accepting the submission and assuming that the DNP was created by the Commonwealth Parliament to act as an agent of the body politic of the Commonwealth of Australia, there is a significant difference between equating the actions of the DNP with the actions of any other agent of the body politic of the Commonwealth of Australia and equating the DNP with the body politic of the Commonwealth of Australia. The DNP cannot be equated with the body politic of the Commonwealth of Australia.

236 Therefore, although the Attorney-General of the Commonwealth is correct that the DNP can be equated with other members of the Executive Government, there is no immunity from criminal liability of the DNP under the Sacred Sites Act. As the CEO of the AAPA submitted, and as the Attorney-General properly accepted, no officer, employee or other agent of the body politic of the Commonwealth of Australia, even a Minister, is conferred any immunity from criminal liability under the Sacred Sites Act. Hence, the DNP would have no immunity even if the governmental nature of the functions and powers of the DNP meant that the Sacred Sites Act should treat the DNP in precisely the same way as a Minister of State or any other officer, employee or other agent of the Commonwealth of Australia.

237 That common position is correct and should be accepted. But it cannot be taken further. Unlike the body politic of the Commonwealth of Australia, which is the subject of an implied immunity from criminal liability under the Sacred Sites

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384 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [33].

Act, there is no basis for any intention to be taken from the Sacred Sites Act for the DNP to be treated as though it had not merely the status of an officer, employee or other agent of the body politic of the Commonwealth of Australia, but the status of the body politic itself.

238 The Legislative Assembly of the Northern Territory exercised its power to enact the Sacred Sites Act by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) and s 73(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was said to empower the Legislative Assembly to "participate in this most important legislative process in particular in relation to the protection of sacred sites".[385] Part III of the Sacred Sites Act is "one of the most important aspects of the ... legislation", providing the protection of sacred sites with a "mechanism for accountability".[386]

239 The importance of this subject matter, coupled with the enhancement of the protection of sacred sites and the desire for wider accountability introduced when the Sacred Sites Act replaced the *Aboriginal Sacred Sites Ordinance 1978* (NT), affords no basis for reading down a "body corporate" to exclude those statutory corporations that are exercising powers of the executive or performing functions of the executive any more than a "natural person" could be read down to exclude any government official who exercises those powers or performs those functions.

VII. Conclusion

240 The appeal should be allowed. Orders should be made to set aside order 1 of the orders of the Full Court of the Supreme Court of the Northern Territory dated 30 September 2022 and, in its place, order that the question referred to the Full Court be answered:

> "The offence and penalty prescribed by s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) apply to the Director of National Parks as a matter of statutory construction."

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385 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3084.

386 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 October 1988 at 4489-4490.

241 STEWARD J. I gratefully adopt the description of the facts found in the reasons of Gordon and Gleeson JJ and of Edelman J.

242 This appeal is simply resolved.

243 First, the Commonwealth and each State and Territory are distinct bodies politic. As our federal system of government endures as a constitutional monarchy, it is both entirely correct and apt that the body politic of each State and Territory and the Commonwealth be described by reference to our Crown. Thus, the body politic that is the Commonwealth is accurately defined as the Crown in right of the Commonwealth.[387]

244 Secondly, I respectfully agree with the reasons of each of Gageler CJ and Beech-Jones J, of Gordon and Gleeson JJ and of Edelman J that the 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" is a presumption confined to each of the bodies politic that comprise our federation.[388] It is not a reference to those agents, instrumentalities or corporations that exercise executive power. Given contemporary principles of statutory construction, whether presumptions like this continue to have any useful role to play in the divination of parliamentary intention may be doubted.

245 Thirdly, I respectfully agree with the reasons of each of Gordon and Gleeson JJ and of Edelman J that the Director of National Parks is not a body politic; it is a statutory office manifested as a corporation sole.[389] The *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which establishes the continuation of that corporation sole, contains no equivalent provision to that

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387 *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 40-41 [75].

388 *Cain v Doyle* (1946) 72 CLR 409 at 424 per Dixon J. See reasons of Gageler CJ and Beech-Jones J at [15]-[27], Gordon and Gleeson JJ at [39], [48], [77], [83], [102]-[104], Edelman J at [148].

389 Section 514A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). See reasons of Gordon and Gleeson JJ at [34], Edelman J at [125], [129].

considered in, for example, *Telstra Corporation Ltd v Worthing*.[390] Instead, it expressly provides that it binds the Crown in each of its capacities.[391]

246 Fourthly, I respectfully agree with the reasons of each of Gordon and Gleeson JJ and of Edelman J that the Director of National Parks, being a corporation, may be criminally liable under s 34 of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).[392] That provision creates an offence for the carrying out of work on a sacred site by a "person". Pursuant to s 17 of the *Interpretation Act 1978* (NT) a "person" includes a body corporate. It thus includes the Director of National Parks.

247 It follows that it is otherwise unnecessary to consider the scope and application of the presumption applied by Dixon J in *Cain v Doyle*. That presumption has nothing to do with this appeal. Nor is it necessary to consider the scope and application of s 4 of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). That provision also has nothing to do with this appeal, once it is accepted that the Director of National Parks is not a body politic.

248 I respectfully agree with the orders proposed by Gordon and Gleeson JJ.

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390 (1999) 197 CLR 61. Section 21(3) of the *Telecommunications Act 1975* (Cth), considered in *Telstra Corporation Ltd v Worthing*, provided that the Australian Telecommunications Commission was "not subject to any requirement, obligation, liability, penalty or disability under a law of a State or Territory to which Australia is not subject". See reasons of Gageler CJ and Beech-Jones J at [29], Gordon and Gleeson JJ at [98]-[99], Edelman J at [194].

391 Section 4 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

392 See reasons of Gordon and Gleeson JJ at [110]-[117], Edelman J at [208]-[230].

249 JAGOT J. Given the other reasons for judgment, it is sufficient to record the following matters to explain my conclusion that the Director of National Parks ("the DNP") may be prosecuted as a body corporate for an offence against s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("the Sacred Sites Act").

Key statutory provisions

250 The DNP, under Commonwealth legislation, is a body corporate with perpetual succession and may sue and be sued in its corporate name.[393]

251 Section 34(1) of the Sacred Sites Act provides:

"**Work on sacred site**

(1) A person shall not carry out work on or use a sacred site.

Maximum penalty: In the case of a natural person –

400 penalty units or imprisonment for 2 years.

In the case of a body corporate –

2 000 penalty units."

252 The *Interpretation Act 1978* (NT) ("the NT Interpretation Act") provides in s 24AA(1) that "[i]n an Act, a reference to a person generally includes a reference to a body politic and body corporate as well as an individual". By s 24AA(2), s 24AA(1) "is not displaced merely because there is an express reference to either an individual, body politic or body corporate elsewhere in the Act". Section 38B of that Act provides that "[a] provision of an Act relating to offences shall be read as referring to bodies corporate as well as to individuals". It is also convenient to record here that, by s 18A of the NT Interpretation Act, an "Agency" is defined in a way to confine the scope of that term, in an Act of the Northern Territory,[394] to "a department or unit of a department, or other authority or body: (a) nominated as an Agency in an Administrative Arrangements Order; or (b) declared by an Act to be an Agency for the *Public Sector Employment and Management Act 1993* or the *Financial Management Act 1995*". The DNP is not an Agency under the NT Interpretation Act.

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393 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 514E(1).

394 *Interpretation Act 1978* (NT), ss 3, 17.

253 In distinguishing between a body politic, a body corporate, and an individual, the NT Interpretation Act may be understood as reflecting the conception of each of the Commonwealth, the States and the Territories being a separate body politic, commonly referred to in that capacity as the Crown in right of the Commonwealth, or any State or Territory.[395]

254 Section 4 of the Sacred Sites Act is in these terms:

"**Act binds Crown**

(1) This Act binds the Territory Crown and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

(2) If the Territory Crown in any of its capacities commits an offence against this Act, the Territory Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.

(3) This section does not affect any liability of an officer, employee or agent of the Territory Crown to be prosecuted for an offence.

(4) In this section:

Territory Crown means the Crown in right of the Territory and includes:

(a) an Agency; and

(b) an authority or instrumentality of the Territory Crown."

The second respondent's two arguments

255 The arguments for the second respondent are best able to be understood in the immediate context of s 4 of the Sacred Sites Act.

256 The second respondent's first argument involves three preliminary steps. These steps are: (1) s 4(1) expresses a legislative intention that the Sacred Sites Act binds (in the sense of applies to) the Crown in right of the Northern Territory and the Crown in right of all other bodies politic in Australia, including the Crown in right of the Commonwealth; (2) however, s 4(1) is to be construed in the context of s 4 as a whole, in which s 4(2) makes specific provision for the criminal liability of only one Crown, being the Crown in right of the Northern Territory, and no other Crown; and (3) by implication from s 4(2), s 4(1) means that the Sacred Sites

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395 *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at 40-41 [75].

Act binds the Crown in right of all bodies politic in Australia but does not thereby impose criminal (as opposed to civil) liability on any Crown other than the Crown in right of the Northern Territory.

257 These three preliminary steps, however, are insufficient for the purposes of the second respondent's first argument, namely, that the DNP is not within the scope of the criminal liability imposed by s 34(1) of the Sacred Sites Act on a "body corporate". This is because the first argument necessitates a further step to the effect that the DNP has the same status as the Crown in right of the Commonwealth and the immunities of that Crown from criminal liability imposed by s 34(1) of the Sacred Sites Act.

258 The second respondent's second argument involves two preliminary steps. These steps are: (1) *Cain v Doyle*,[396] and cases applying *Cain v Doyle*, establish that a statute that binds the Crown does not thereby impose criminal liability on the Crown, unless there is the clearest statement of intention to do so; and (2) general words, such as those in s 34(1) of the Sacred Sites Act imposing criminal liability on bodies corporate, are insufficient to amount to a clear statement of intention to impose criminal liability on a body corporate that has the same legal status as a Crown in right of any State or Territory or the Commonwealth (other than the Crown in right of the Northern Territory by reason of s 4(2) of that Act).

259 The second step in this second argument assumes the further step identified above for the purpose of the first argument – that the DNP has the same status as the Crown in right of the Commonwealth and the immunities of that Crown from criminal liability imposed by s 34(1) of the Sacred Sites Act.

260 The second respondent contended that these two arguments operate alternatively and cumulatively. However, there is a single issue of statutory construction – does s 34(1) impose criminal liability on the DNP as a body corporate – and the two arguments are both directed to that single issue. Moreover, the two steps in the second argument are both concerned with presumptions about statutory interpretation. Accordingly, the presumptions should be considered first.

Legal and interpretative presumptions

In the beginning

261 The reasoning in *Cain v Doyle* did not emerge from a vacuum. It was founded on centuries of intellectual and jurisprudential wrangling between the Parliament and the Crown in England, from which Australia inherited its system

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396 (1946) 72 CLR 409.

of constitutional monarchy. From that wrangling, certain strands of thought came to dominate.

262 First, the law presumed that "the king will do no wrong",[397] so a person harmed by the monarch had no cause of action on which to sue the monarch. This is a presumption of law.

263 Second, it became a "well-established rule, generally speaking, in the construction of acts of Parliament, that the king is not included unless there be words to that effect; for it is inferred primâ facie that the law made by the crown, with the assent of Lords and Commons, is made for subjects and not for the crown".[398] Lord Campbell CJ, in 1859, had cause to describe this as a "sacred maxim": "the Crown is not bound by an act of Parliament, unless it is quite clear, from the language employed, that the Legislature contemplated including the Crown, and her Majesty, in giving her royal assent, assented that the Crown should be bound, and was fully aware that she was giving her assent to be subject to the provisions of the statute".[399] This is a presumption of statutory interpretation.

264 Third, because the monarch primarily acted through servants and agents rather than personally, the first presumption of law extended to give the monarch immunity if wrongful conduct was the conduct of servants and agents of the monarch.[400] This third strand of thought, at one level, reflected nothing more than the doctrine of agency (that the monarch as principal could act through servants and agents). This strand applied strictly to the benefit of the person of the monarch. It did not mean that the monarch's servants and agents or other persons authorised by statute (made by Parliament) or the Executive (Ministers of the Crown or others) could themselves "do no wrong".

265 Consequently, because the monarch primarily acted through servants and agents rather than personally, the second interpretative presumption, that statutes do not apply to the monarch, extended beyond the person of the monarch to the

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397 Hale, *The History of the Pleas of the Crown* (1736), vol 1, ch 7 at 43.

398 *Attorney-General v Donaldson* (1842) 10 M & W 117 at 123-124 [152 ER 406 at 408-409]. See also *Moore v Smith* (1859) 5 Jur NS 892 at 893.

399 *Moore v Smith* (1859) 5 Jur NS 892 at 893.

400 eg, *Attorney-General v Donaldson* (1842) 10 M & W 117 at 123 [152 ER 406 at 408]; *Tobin v The Queen* (1864) 16 CB (NS) 310 at 354 [143 ER 1148 at 1165]; *Mersey Docks and Harbour Board Trustees v Cameron* (1865) 11 HLC 443 at 501-502, 508, 511-512 [11 ER 1405 at 1427, 1430, 1431]; *Feather v The Queen* (1865) 6 B & S 257 at 295-297 [122 ER 1191 at 1205-1206].

servants and agents of the monarch acting in that capacity (for example, persons occupying premises as servants and agents of the monarch).

The presumptions in action

266 The confining of the first presumption of law, that the monarch can do no wrong, to the monarch personally is exemplified by the reasoning in *Tobin v The Queen*.[401] There it was held that a naval captain in Her Majesty's Navy, acting in accordance with an Act of Parliament, was not a servant of the monarch for three reasons: "[f]irst, that the Queen does not appoint a captain to a ship by her own mere will, as a master chooses a servant, but through an officer of state responsible for appointing a man properly qualified"; "secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty"; and, "thirdly, because the act complained of was not done by the order of the Queen, but by reason of a mistake in respect of the path of duty".[402] Erle CJ described the operation of the maxim "the King can do no wrong" as follows:[403]

> "The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command ...
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> This maxim has been constantly recognized; and the notion of making the King responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the sovereign."

267 The confining of the first presumption of law, that the monarch can do no wrong, to the monarch personally is also apparent in *Feather v The Queen*.[404] There Cockburn CJ, delivering the judgment of the Court, said "in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown – a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of

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401 (1864) 16 CB (NS) 310 [143 ER 1148].

402 (1864) 16 CB (NS) 310 at 352 [143 ER 1148 at 1164].

403 (1864) 16 CB (NS) 310 at 353-355 [143 ER 1148 at 1165].

404 (1865) 6 B & S 257 [122 ER 1191]. See, in the Australian context, *Clough v Leahy* (1904) 2 CLR 139 at 155-156.

the Crown on the one hand, and the rights and liberties of the subject on the other".[405]

268 That the second interpretative presumption applied to the monarch and the monarch's servants and agents acting in that capacity, but not to other bodies merely because they performed public functions, was exposed in *Mersey Docks and Harbour Board Trustees v Cameron*.[406] The House of Lords reiterated the distinction between the Crown and its servants (on the one hand) and other bodies established for public purposes (on the other hand). Lord Cranworth explained that the "shield of the Crown" (meaning only immunity from the application of statutes) extended to servants and agents of the Crown acting in the Crown's direct interests but did not extend to other bodies acting for public purposes.[407]

269 In the Australian context, where the monarch was not present, the Crown could not mean the monarch personally. Rather, it could mean only the government as a body politic. In *Farnell v Bowman*,[408] the Privy Council considered that legislation providing for claims against the Crown in right of New South Wales meant what it said (that the Crown in right of New South Wales could be sued), including on the basis that:[409]

> "It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the king can do no wrong' were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England."

270 Later, in *Sydney Harbour Trust Commissioners v Ryan*,[410] Barton J reasoned that a statute which removed an employer's defence applied to the Crown in right of the State of New South Wales on the basis that it was "reasonable to suppose that the legislature ... bore in mind when framing that Act both its own Statute as to claims against the Government and the case of *Farnell v Bowman*,

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405 (1865) 6 B & S 257 at 297 [122 ER 1191 at 1205-1206].

406 (1865) 11 HLC 443 [11 ER 1405].

407 (1865) 11 HLC 443 at 508-509 [11 ER 1405 at 1430].

408 (1887) 12 App Cas 643.

409 (1887) 12 App Cas 643 at 649.

410 (1911) 13 CLR 358.

which is so thoroughly well known. If they had intended to exempt the Crown from the liability consequent upon the extension they were giving to the remedies of workmen, they could and most probably would have said so."[411]

271 Where, however, a statute did not provide for the Crown to be bound by express terms or necessary implication, the interpretative presumption against the Crown being bound remained (in Australia, necessarily in the sense of the Crown as the body politic and not as the monarch personally). For example, in *Roberts v Ahern*,[412] Griffith CJ, delivering the judgment of the Court, explained that the "modern sense" of the interpretative presumption is that "the Executive Government of the State is not bound by Statute unless that intention is apparent".[413] In *Minister for Works (WA) v Gulson*,[414] Latham CJ explained that "it is now well established that prima facie legislation does not apply to the government of the country, but to the persons in the country who are subject to the legislative powers of the parliament".[415]

Cain v Doyle

272 In *Cain v Doyle*,[416] the Commonwealth (in this context, meaning the Crown in right of the Commonwealth) operated a factory. Doyle managed the factory for the Commonwealth. Doyle sacked an employee of the Commonwealth who worked at the factory. The relevant Act provided that "'employer' includes the Crown (whether in right of the Commonwealth or of a State) and any authority constituted by or under the law of the Commonwealth or of a State or Territory of the Commonwealth". The Act also provided that an employer of specified employees could not terminate the employment of those employees, the penalty for contravention being £100. Doyle was alleged to have aided and abetted the Commonwealth to contravene that provision, the Commonwealth being the principal offender and Doyle being an accessory. The issue was whether the Crown in right of the Commonwealth, being expressly included within the definition of "employer", was able to be criminally liable under a provision criminalising certain conduct of "employers".

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411 (1911) 13 CLR 358 at 371 (footnote omitted).

412 (1904) 1 CLR 406.

413 (1904) 1 CLR 406 at 418. See also *R v Sutton* (1908) 5 CLR 789 at 796.

414 (1944) 69 CLR 338.

415 (1944) 69 CLR 338 at 347.

416 (1946) 72 CLR 409.

273 Latham CJ held that "[i]n the case of the criminal law, the application of the rule that the King can do no wrong is *a fortiori*. It has never been suggested that the criminal law binds the Crown."[417] He said:[418]

> "Ministers and officers of the Crown can be guilty of breaches of Commonwealth law and Parliament could, if it thought proper, subject them to the penalties to which private employers are liable under the Act. But the fundamental idea of the criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence."

274 While Latham CJ's approach has been described as "a lonely Australian judicial opinion that denies the possibility that the Crown could be guilty of a criminal offence",[419] that may be an overstatement. His Honour's conclusion was that "Parliament did not intend to subject the Crown to conviction and fine",[420] which brings his reasoning within the mainstream of a strong presumption against the Crown being criminally liable.

275 Dixon J (with whom Rich J agreed[421]) said that "[t]here is ... 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", whilst allowing that "[c]onceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them".[422] He held that the part of the provision imposing the penalty of £100 was not intended to apply to the Crown in right of the Commonwealth.[423]

276 Starke J, in dissent on this point, said that "[s]overeign bodies may create rights and obligations against themselves and submit the determination of those rights and obligations to the jurisdiction of the Courts and provide means for

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417 (1946) 72 CLR 409 at 417-418.

418 (1946) 72 CLR 409 at 418.

419 Hogg, Monahan and Wright, *Liability of the Crown*, 4th ed (2011) at 440.

420 (1946) 72 CLR 409 at 418.

421 (1946) 72 CLR 409 at 419.

422 (1946) 72 CLR 409 at 424.

423 (1946) 72 CLR 409 at 426.

enforcing them".[424] He concluded that the provision imposing criminal liability should "be given its plain and ordinary meaning in the English language unless some gross or manifest absurdity is thereby produced".[425] As there was no such absurdity, in Starke J's view the Commonwealth could be criminally liable.

277 Williams J, also in dissent on this issue, referred to the principle that "the Crown must be expressly named or a necessary implication to that effect must appear in a statute before it can be bound in respect of its prerogatives, rights, immunities or property".[426] He observed that "[i]t is certainly most unusual if not unique for legislation to provide for the prosecution of the Crown. But there is no constitutional difficulty in the way of the Sovereign binding himself in Parliament. It is a question in each case of the extent to which he is intended to be bound."[427] Williams J also made the point, now a given in Australia, that "[t]he Crown means of course not His Majesty in person but the Government of the Commonwealth or State of the day".[428] Williams J found "no scintilla of indication of any intention in the Act that the Crown should be subject to the obligations of an employer but not liable to the express statutory remedies for breach".[429]

The "shield of the Crown"

278 Subsequently, in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*,[430] the issue was whether the Commissioner as lessor was bound by tenancy legislation that provided it did not bind the Crown in right of the Commonwealth or the State, where the statute constituting the Commissioner provided that "for the purposes of any Act the Commissioner for Railways shall be deemed a statutory body representing the Crown". Williams, Webb and Taylor JJ framed the question as whether the Commissioner was a servant or agent of the Crown and as such entitled to the benefit of the prerogatives, privileges and immunities of the Crown.[431] Their Honours held that, as a servant and agent of the Crown, the Commissioner was not bound by the tenancy legislation. Kitto J, in

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424 (1946) 72 CLR 409 at 420.

425 (1946) 72 CLR 409 at 421.

426 (1946) 72 CLR 409 at 428.

427 (1946) 72 CLR 409 at 431.

428 (1946) 72 CLR 409 at 431.

429 (1946) 72 CLR 409 at 432.

430 (1955) 93 CLR 376.

431 (1955) 93 CLR 376 at 382.

dissent (Fullagar J agreeing[432]), distinguished between the Crown in right of the State of New South Wales and the Commissioner. Kitto J described the statutory formula "statutory body representing the Crown" as inexact, as the "Sovereign alone is the Crown".[433] In Australia, therefore, "where questions concerning the Monarch personally can seldom arise, the Crown normally means the Sovereign considered as the central government of the Commonwealth or a State".[434] In Kitto J's view, the question was not whether the Commissioner was a servant or agent of the Crown, but whether "the operation of the provision upon the subject [in this case, the Commissioner] would mean some impairment of the existing legal situation of the Sovereign".[435] As "the immunity of the Crown can never inure for the benefit of a subject[,] [w]hoever asserts it must assert it on behalf of and for the benefit of the Crown".[436] The Commissioner, "a corporation, suing in this case as a party principal to the litigation, and claiming to recover possession of land which is vested absolutely in him both at law and in equity", was not outside the scope of the tenancy legislation.[437] Kitto J's view would ultimately prevail, but not for some five decades.

279 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[438] concerned the application of the *Trade Practices Act 1974* (Cth) to the Commissioner for Railways of the State of Queensland. The *Trade Practices Act* expressly bound the Crown in right of the Commonwealth but was silent about the Crown in right of the States. Was the Commissioner, a body established by State legislation, bound by the *Trade Practices Act*? To the extent relevant for present purposes one question was whether the Commissioner was an instrumentality or agent of the Crown and entitled to its immunities. That question was answered by reference to the Queensland legislation establishing the Commissioner as a corporation sole "representing the Crown" and, "as such corporation, for all the purposes of any Act, shall have and may exercise all the powers, privileges, rights, and remedies of the Crown". Also relevant to that characterisation of the Commissioner as an agent of the Crown and entitled to its immunities were the extent of ministerial control over the Commissioner and the function of railways having traditionally

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432 (1955) 93 CLR 376 at 391.

433 (1955) 93 CLR 376 at 392.

434 (1955) 93 CLR 376 at 393.

435 (1955) 93 CLR 376 at 393.

436 (1955) 93 CLR 376 at 395.

437 (1955) 93 CLR 376 at 395.

438 (1979) 145 CLR 107.

been regarded as governmental in Australia.[439] On that basis, the non-application of the *Trade Practices Act* to the Commissioner involved a wide approach to the presumption that statutes do not bind the Crown other than by express words or necessary implication, that is, that the presumption applied to the Crown irrespective of the source of the legislation.[440]

280 In *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*,[441] the question was whether the appellant, a Commonwealth body, was liable to stamp duty under South Australian legislation. To the extent relevant for present purposes, the approach taken was to ask if the Commonwealth body was the Crown in right of the Commonwealth or a "manifestation", an "alter ego" or an "emanation" of the Crown in right of the Commonwealth.[442]

281 In *Townsville Hospitals Board v Townsville City Council*,[443] the status of the Board was relevant to the application of legislation of the same legislature, Queensland, regulating building works. The *Building Act 1975* (Qld) provided that it did not apply where a building was to be erected by the Crown or on behalf of the Crown or by or on behalf of a body which, for the purposes of the erection of the building, represents the Crown. The Board claimed that this exemption applied to a building it was to construct on Crown land, despite no provision of its enabling Act identifying the Board as representing the Crown or having any immunities of the Crown. Gibbs CJ (with whom Murphy, Wilson and Brennan JJ agreed[444]) explained that the status of the Board depended on "the intention to be derived from the statute under which the body in question is constituted",[445] noting that it was possible for such a body to be "given the immunities and privileges of the Crown for one purpose and not for another".[446] Gibbs CJ continued in these terms:[447]

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439 (1979) 145 CLR 107 at 115.

440 eg, (1979) 145 CLR 107 at 123, 128-129, 136.

441 (1979) 145 CLR 330.

442 eg, (1979) 145 CLR 330 at 335, 336, 354, 359, 367, 368, 370, 371. See also 365-366.

443 (1982) 149 CLR 282.

444 (1982) 149 CLR 282 at 292.

445 (1982) 149 CLR 282 at 289.

446 (1982) 149 CLR 282 at 288.

447 (1982) 149 CLR 282 at 291.

> "It has more than once been said in this Court that 'there is evidence of a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless parliament has by express provision given it the character of a servant of the Crown' ... All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention."

282 In other words, but without overruling *Wynyard Investments*, a body was not to be characterised as a servant, agent, manifestation, alter ego, or emanation of the Crown (as a body politic) unless the statute creating the body expressly or implicitly so provided, and neither the functions of the body nor the existence of some ministerial control over its conduct were necessarily sufficient to result in that characterisation. Further, even if a body was an agent of the Crown, that does not mean that it thereby was entitled to the benefit of all immunities of the Crown.

283 The parallel expansion of government functions in England and Wales meant that, by 1964, Diplock LJ could say:[448]

> "The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication ... [T]he executive functions of sovereignty are of necessity performed through the agency of persons other than the Queen herself. Such persons may be natural persons or, as has been increasingly the tendency over the last hundred years, fictitious persons – corporations."

284 Accordingly, both in Australia and in England and Wales, for the purpose of the statutory presumption that the Crown was not bound by statute other than by express words or necessary implication, the Crown meant the government of the relevant body politic (rather than the monarch personally). Further, a wide view of the presumption had prevailed so that it applied not only to servants and agents of the Crown as body politic but to all servants, agents, manifestations, alter egos, or emanations of not only the body politic which was the source of the legislation (Commonwealth, State, or Territory) but also all such bodies politic. To be characterised as a servant, agent, manifestation, alter ego, or emanation of a body

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448 *British Broadcasting Corporation v Johns (Inspector of Taxes)* [1965] Ch 32 at 78-79.

politic and entitled to any of its immunities, the more stringent approach in *Townsville Hospitals Board* was not readily reconcilable with the majority reasoning in *Wynyard Investments*, an anomaly that would not ultimately be resolved until *McNamara v Consumer Trader and Tenancy Tribunal*.[449] It remained clear, however, that for the purpose of the substantive rule of law that the Crown could do no wrong, immunity was confined to the Crown as body politic and no person who claimed to be committing a legal wrong under the authority of the Crown could claim the immunity of the Crown. This is the context in which *Bropho v Western Australia*[450] was decided.

Bropho

285 *Bropho* concerned a statutory provision prohibiting a person from, amongst other things, destroying or damaging an Aboriginal site. Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ considered whether a statutory corporation, identified in its enabling statute as an agent of the Crown which enjoyed the status, immunities, and privileges of the Crown, was subject to the prohibition. Their Honours said that while "[t]he rule that statutory provisions worded in general terms are to be construed as prima facie inapplicable to the Crown was initially confined to provisions which would have derogated from traditional prerogative rights", it had come to be accepted as a rule of "general application".[451] In Australia, the rule that legislative provisions worded in general terms are prima facie inapplicable to the Crown was "a rule of statutory construction which identifies a presumption to be applied in ascertaining the relevant legislative intent" and therefore may be "supplemented, modified or reversed by legislative provision".[452] They said:[453]

> "The rule presents no real problem of principle in so far as it operates to express a presumption that statutory provisions do not apply to the actual person of the Sovereign. The presumption is not, however, confined to the Sovereign herself but extends to confer prima facie immunity in relation to the activities of governmental instrumentalities or agents acting in the course of their functions or duties as such ...
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> Again, the rule gives rise to no significant problem of principle to the extent that it expresses a bare presumption that the general words of a

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449 (2005) 221 CLR 646.

450 (1990) 171 CLR 1.

451 (1990) 171 CLR 1 at 14.

452 (1990) 171 CLR 1 at 15.

453 (1990) 171 CLR 1 at 15-16 (footnote omitted).

statutory provision do not extend to bind 'servants or agents of the executive government ... in relation to acts which they do or property which they own or occupy exclusively in that capacity'."

286 Their Honours recognised that the presumption, and its extension to governmental instrumentalities or agents, may "offend notions of parity" (that is, between the legal status of private citizens and the state) but, "[b]e that as it may, the consistent recognition of such a presumption has undoubtedly created a firm factual foundation for it".[454] They considered the description in *Moore v Smith* of "a sacred maxim" – "that the Crown is not bound by an act of Parliament, unless it is quite clear, from the language employed, that the Legislature contemplated including the Crown"[455] – to have "little relevance", at least in Australia, "to the question whether a legislative provision worded in general terms should be read down so that it is inapplicable to the activities of any of the employees of the myriad of governmental commercial and industrial instrumentalities covered by the shield of the Crown".[456]

287 Their Honours' analysis of the contemporary Australian context led them to two conclusions: first, "that it simply would not occur to any legislature of this country that a failure to indicate by express words or necessary implication that the provisions of a Criminal Code or general criminal statute were applicable to servants of the Crown in the course of their duties as such would result in a situation where Crown servants were placed beyond the reach of the ordinary criminal law in so far as they were acting with the authority of the Crown";[457] and, second, that "considerations of principle preclude recognition of an inflexible rule that a statute is not to be construed as binding the Crown or Crown instrumentalities or agents unless it manifests a legislative intent so to do either by express words or by 'necessary implication'".[458]

288 Given the long history of the strong presumption against the Crown being bound by a statute other than by express words or necessary implication, their Honours said that "it may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests were seen as of general application at the time when the particular provision was enacted"; however, "[i]n the case of legislative provisions

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454 (1990) 171 CLR 1 at 16.

455 *Moore v Smith* (1859) 5 Jur NS 892 at 893, quoted in *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

456 (1990) 171 CLR 1 at 19.

457 (1990) 171 CLR 1 at 21.

458 (1990) 171 CLR 1 at 22.

enacted subsequent to this decision, the strength of the presumption that the Crown is not bound by the general words of statutory provisions will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises".[459] Insofar as the immediate case was concerned, their Honours described it as involving "whether the employees of a governmental corporation engaged in commercial and developmental activities are bound by general provisions designed to safeguard places or objects whose preservation is of vital significance to a particular section of the community".[460] This led to the answer that "the presumption against the applicability of general words to bind such employees will represent little more than the starting point of the ascertainment of the relevant legislative intent".[461] It followed that the interpretative presumption that the statutory prohibition did not bind the Crown (in the wide contemporary sense) was rebutted so that the statutory prohibition applied "indifferently to natural persons in Western Australia, including government employees".[462]

289 In *Bropho*, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ did not refer to *Cain v Doyle*. In referring to the potential criminal liability of the Crown, their Honours confined themselves to the orthodox proposition that no person can claim immunity from the general criminal law by reason of acting under the authority of the Crown.[463]

Post-Bropho

290 Subsequent decisions confirm that *Bropho* did not, and was not understood to, implicitly overrule the reasoning of Latham CJ, Rich and Dixon JJ in *Cain v Doyle*. Rather it recast the formerly rigid interpretative presumption against the Crown being bound by a statute only by express words or necessary implication into a more flexible presumption – the strength or weakness of which depends on the full context of the provision in question. While the presumption was accepted to extend to the servants, agents, manifestations, alter egos, and emanations of the bodies politic of the Commonwealth, States and Territories, the tension between *Wynyard Investments* and *Townsville Hospitals Board* – concerning the status of a body as representing the Crown and the significance of that status for any immunities of the Crown to which the body may be entitled – remained unresolved.

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459 (1990) 171 CLR 1 at 23.

460 (1990) 171 CLR 1 at 23.

461 (1990) 171 CLR 1 at 23.

462 (1990) 171 CLR 1 at 25.

463 (1990) 171 CLR 1 at 21.

291 In *Jacobsen v Rogers*,[464] Mason CJ, Deane, Dawson, Toohey and Gaudron JJ repeated the (by then) orthodoxy that: (a) the Crown is now understood to be the executive branch of government; (b) as such, the Crown carries out its functions through servants and agents; (c) those servants and agents have never been immune from criminal sanction; and (d) the Crown itself, however, "may not be subjected to criminal liability, save in the most exceptional circumstances".[465] In respect of the fourth proposition, the authority cited in support was *Cain v Doyle*.[466]

292 In *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*,[467] Brennan CJ, Dawson, Toohey and Gaudron JJ considered the question whether the Board, a statutory corporation created under legislation of New South Wales, was bound by Western Australian stamp duties legislation. Their Honours held that the Western Australian stamp duties legislation was not drafted on the basis of the rigid presumption as it applied before *Bropho*, so that there was "no difficulty in approaching the construction of the Act in the more flexible manner laid down in that case".[468] They then explained that different considerations applied to the criminal provisions of the Western Australian stamp duties legislation by reference to the different presumption discussed in *Cain v Doyle* "based upon the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty".[469] The generality of the criminal provision (referring to "persons") was insufficient to create an offence of which the Crown could be guilty. They did not need to answer the question whether the Board was the Crown for the purpose of determining liability for the payment of stamp duty under the Western Australian stamp duties legislation because, but for the criminal provision, it was clear that the legislation applied to the Crown.[470]

293 A possible outlier in the stream of authority concerning *Cain v Doyle* is the passing reference to that case by McHugh and Gummow JJ in *State Authorities Superannuation Board*. Their Honours said that "[t]he same [*Cain v Doyle*] presumption has been said to apply where a statute has conferred the immunity of

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464 (1995) 182 CLR 572.

465 (1995) 182 CLR 572 at 587.

466 (1995) 182 CLR 572 at 587 fn 58.

467 (1996) 189 CLR 253.

468 (1996) 189 CLR 253 at 270.

469 (1996) 189 CLR 253 at 270.

470 (1996) 189 CLR 253 at 270.

the Crown upon a body or corporation",[471] citing in support *Bolwell v Australian Telecommunications Commission*[472] and *R v Eldorado Nuclear Ltd*.[473] In *Bolwell*, Smithers J did refer to "the Crown and an emanation of the Crown" being within the scope of the presumption in *Cain v Doyle*,[474] citing in support *F Sharkey & Co Pty Ltd v Fisher*.[475] To the extent relevant, however, that case concerned only the status of a State body, not the presumption in *Cain v Doyle*. The other case cited in support, *R v Eldorado Nuclear Ltd*, also concerned the interpretative principle that statutes are presumed not to bind the Crown and the maxim that the monarch (personally) (and therefore the body politic itself) can do no wrong, an immunity which had never been understood to extend to servants or agents of the monarch (or of the body politic).

294 In *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*,[476] Gummow J returned to *Cain v Doyle* to make two salient points: first, that it "may be one thing to expose one element in the federation to civil action by another ... but it is another thing altogether to expose an element in the federation to criminal sanction";[477] and, second, that "[i]t would be to enter into another dimension to conclude that a State might create a criminal offence committed by the Commonwealth in respect of the conduct by the Commonwealth itself of its Executive Government".[478] These observations involve a focus on the unlikelihood of one body politic in the Australian federation imposing criminal liability on another body politic in the federation in its conduct as a government (the *Cain v Doyle* presumption).

295 *Telstra Corporation Ltd v Worthing*[479] concerned the application of New South Wales legislation to a Commonwealth body which, under its enabling statute, was not subject to any requirement, obligation, liability, penalty, or disability under a law of a State to which the Commonwealth was not subject. The

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471 (1996) 189 CLR 253 at 277.

472 (1982) 42 ALR 235 at 241.

473 [1983] 2 SCR 551 at 565-566.

474 (1982) 42 ALR 235 at 241. See also 240.

475 (1980) 33 ALR 173.

476 (1997) 190 CLR 410.

477 (1997) 190 CLR 410 at 472.

478 (1997) 190 CLR 410 at 472.

479 (1999) 197 CLR 61.

New South Wales legislation was expressed to bind the Crown not only in right of New South Wales but in all its other capacities, but also so as not to make the Crown liable to be prosecuted for any offence. Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, citing *Cain v Doyle*, observed that "[i]t will require the clearest indication of a legislative purpose to demonstrate that these penal provisions attach to the Commonwealth", and no such indication was apparent given that the New South Wales legislation provided "that nothing in that statute renders 'the Crown' liable to be prosecuted for any offence".[480] Further, because its own enabling statute provided that the Commonwealth body was not subject to any liability to which the Commonwealth was not subject, the Commonwealth body also was not subject to the penal provisions, the Commonwealth provision to that effect being "a declaration of legislative purpose that the law of the Commonwealth shall operate exclusively of State law on the topic", by s 109 of the *Constitution*.[481]

296 In *McNamara v Consumer Trader and Tenancy Tribunal*,[482] Gleeson CJ, McHugh, Gummow and Heydon JJ, and Hayne J, in separate reasons, disapproved the majority reasoning in *Wynyard Investments*, including on the basis that it was inconsistent with the reasoning of Gibbs CJ in *Townsville Hospitals Board*.[483] Accordingly, a body did not enjoy the immunities of the Crown merely because its enabling statute provided that the body was a statutory body representing the Crown.

297 Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ referred to *Cain v Doyle* in passing in *X v Australian Prudential Regulation Authority*,[484] saying only that "[i]t would require the clearest of intentions that the penalties provided ... would apply to the Commonwealth ... and there may be a question whether a 'Commonwealth authority' such as [the Australian Prudential Regulation Authority] has the character of the Commonwealth for this purpose".[485] That is, their Honours recognised that the presumption in *Cain v Doyle* had not been understood previously to extend beyond the Crown in the sense of the body politic. That understanding is also made clear from the footnote, where, after citing *Cain v*

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480 (1999) 197 CLR 61 at 75 [22].

481 (1999) 197 CLR 61 at 75 [23]-[24].

482 (2005) 221 CLR 646.

483 (2005) 221 CLR 646 at 651-652 [8], 655-667 [23]-[59], 668-669 [61]-[67].

484 (2007) 226 CLR 630.

485 (2007) 226 CLR 630 at 636 [14].

Doyle, their Honours said that "[t]here is, however, no power in the Crown to dispense its servants or agents from criminal liability for acts forbidden by law".[486]

298 In *Wurridjal v The Commonwealth*,[487] Gummow and Hayne JJ referred to *Cain v Doyle* in orthodox terms, saying:[488]

> "In accordance with accepted principles of statutory construction, explained by Dixon J in *Cain v Doyle*, it would require the clearest indication of legislative purpose to demonstrate that such a penal provision attached to the Commonwealth as a body politic."

Post-*Bropho* legislation – overview

299 While the Sacred Sites Act was enacted in 1989, the key provision, s 4 ("Act binds Crown"), was amended in 2005.[489] Accordingly, for present purposes, the Sacred Sites Act may be treated as post-*Bropho* legislation. As such, the prevailing orthodoxy at the time s 4 was amended included those principles of interpretation as explained in *Bropho*.

300 First, there is no "sacred maxim" that the Crown is not bound by a statute other than by express words or necessary intention. Rather, where a statute uses general words only, the strength of the presumption that the Crown is not bound depends upon all relevant circumstances and may be "little more than the starting point of the ascertainment of the relevant legislative intent".[490] Where general words are used, the presumption, whatever its strengths or weaknesses in the circumstances, applies to all statutes (Commonwealth, State, or Territory) and the Crown (Commonwealth, State, or Territory) irrespective of the legislative source (Commonwealth, State, or Territory).

301 Second, to determine if a body is a servant, agent, manifestation, alter ego, or emanation of the Crown and has the benefit of any immunities of the Crown, the necessary focus is the statute establishing and conferring functions on that body. It is not to be assumed that a body that is a servant, agent, manifestation, alter ego, or emanation of the Crown has the immunities of the Crown. It must

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486 (2007) 226 CLR 630 at 636 [14] fn 13, citing *A v Hayden* (1984) 156 CLR 532 at 548, 562, 580-581, 593.

487 (2009) 237 CLR 309.

488 (2009) 237 CLR 309 at 380-381 [164] (footnote omitted).

489 *Northern Territory Aboriginal Sacred Sites Amendment Act 2005* (NT), s 4.

490 *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

clearly appear from the body's enabling statute (or otherwise) that the legislature intended that the body have any such immunities.

302 Third, because a body that is a servant, agent, manifestation, alter ego, or emanation of the Crown may have some or other immunities of the Crown conferred on it for one purpose and not other purposes, there will always be a question whether any such conferral is relevant to the application of any other legislation to the body, be that legislation enacted by the same legislature that established the body or another legislature. If the conferral is in a Commonwealth statute, s 109 of the *Constitution* may be engaged.

303 Fourth, there remains a strong presumption that no statute imposes criminal liability on the Crown – meaning the body politic in respect of its conduct as the government of the body politic. This strong presumption applies to all statutes (Commonwealth, State, or Territory) and the Crown (Commonwealth, State, or Territory) irrespective of the legislative source (Commonwealth, State, or Territory), but has never been held to extend to servants, agents, manifestations, alter egos, or emanations of the Crown. To the contrary, Crown immunity from penal sanction has always been tightly focused on the Crown as body politic, no servant, agent, manifestation, alter ego, or emanation of the Crown being entitled to claim that immunity.

The Sacred Sites Act

304 As enacted, the Sacred Sites Act recorded that it had been passed "with the assent as provided by the *Northern Territory (Self-Government) Act* 1978 of the Commonwealth".

305 The *Northern Territory (Self-Government) Act 1978* (Cth) as made, by s 5, established the "Northern Territory of Australia ... as a body politic under the Crown". Sections 6 to 9 of that Act provided for the Administrator or the Governor-General to assent or withhold assent to laws made by the Legislative Assembly.

306 The *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* (Cth) abolished the power of the Commonwealth executive government to disallow enactments or recommend amendments of any enactments of the Australian Capital Territory and to disallow laws or recommend amendments of any laws of the Northern Territory.

307 As enacted, s 4 of the Sacred Sites Act provided:

> "**CROWN TO BE BOUND**
>
> This 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."

308 As enacted, s 34 of the Sacred Sites Act, relevantly, provided:

"**WORK ON SACRED SITE**

(1) A person shall not carry out work on or use a sacred site.

Penalty: In the case of a natural person – $20,000 or imprisonment for 2 years.

In the case of a body corporate – $40,000."

309 As a pre-*Bropho* enactment, considered in isolation, these provisions would have been construed on the basis that: (a) s 4 was an express statement that the Crown in right of the Territory and the Crown in right of all other bodies politic were intended to be bound by the Act; (b) the words of s 4 most likely would not have sufficed to displace the strong presumption that the penal provisions of the Act were not intended to apply to the Crown in right of any body politic in the exercise of its government functions as a body politic; (c) irrespective of the proper answer to (b), orthodoxy would have meant that the penal provisions of the Act applied to any servant, agent, manifestation, alter ego, or emanation of the Crown (Commonwealth, State, or Territory) in any of its capacities (provided they were a natural person or body corporate); and (d) for any immunities of the Crown to be conferred on any servant, agent, manifestation, alter ego, or emanation of the Crown (Commonwealth, State, or Territory) from the penal provisions of the Act, a clear legislative intention to that effect would need to be apparent in the legislation establishing, or vesting functions in, the body.

310 The *Northern Territory Aboriginal Sacred Sites Amendment Bill 2005* (NT) proposed to amend s 4 in the following terms:

"**Act binds Crown**

(1) This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

(2) If the Crown in any of its capacities commits an offence against this Act, the Crown is liable in that capacity to be prosecuted for the offence as if it were a body corporate.

(3) This section does not affect any liability of an officer, employee or agent of the Crown to be prosecuted for an offence.

(4) In this section –

'Crown' includes –

(a) an Agency; and

(b) an authority or instrumentality of the Crown."

311 Understood in context, the objective legislative intent of the proposed amendments is clear. Section 4 remained (as s 4(1)). Section 4(2) would have subjected the Crown in right of a body politic (Commonwealth, State, or Territory) to the penal provisions of the Act, deeming them to be a body corporate to be penalised as such. Section 4(3) would have embodied the orthodox view that no officer, employee, or agent of the Crown could have claimed any Crown immunity for a criminal offence. Section 4(4) would have deemed authorities or instrumentalities of the Crown (Commonwealth, State, or Territory) to be the "Crown" for the purposes of both sub-ss (1) and (2) of s 4 and enabled them to be prosecuted as bodies corporate.

312 The Debates on the *Northern Territory Aboriginal Sacred Sites Amendment Bill 2005* (NT) in the Legislative Assembly on 20 October 2005 recorded that "[t]he inability to prosecute the Crown for sacred site damage and thus seek a form of reparation is a source of dissatisfaction amongst both authority members and the Aboriginal custodians".[491] The Bill was said to provide "an appropriate capacity to prosecute the Crown by clarifying that": (a) "if the Crown in any of its capacities commits an offence against [the Sacred Sites Act], then it is liable in that capacity"; (b) "the 'Crown' includes agencies, authorities and instrumentalities of the Crown"; and (c) "the existing liability of an officer, employee or agent of the Crown to be prosecuted for an offence is not affected".[492] In other words, the Debates accurately reflected the manifest objective intention of the proposed amendments as described above.

313 The subsequent Debates on 1 December 2005, however, expose questions that had arisen. The Attorney-General said:[493]

"Case law would indicate that individual employees and agents of the Crown are liable to prosecution already. This is made clear in the

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491 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2005 at 1062.

492 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2005 at 1062-1063.

493 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1349.

amendment. However, this amendment also intends to make it clear that agencies and authorities are liable for prosecution as well.

On the question of whether the amendment is able to bind the Crown or the Northern Territory government, there has been further information sought on this from the Solicitor-General. I will not share that with the House; I will leave that to the minister carrying the next stage of the debate. Certainly, the Solicitor-General has clarified the situation between the two governments."

314 The two governments in question are the Northern Territory government and the Commonwealth.

315 The Minister Assisting the Chief Minister on Indigenous Affairs subsequently said:[494]

"The Northern Territory Aboriginal Sacred Sites Act already binds the Crown but, in this case, the law is not always clear. I am aware that we are going to invite the defeat of section 4, that part that applies to the Commonwealth, and we will give an explanation about that later. Case law indicates that individual employees and agents of the Crown are liable to prosecution already. This is made very clear in the amendment.

This amendment also intends to make it clear that agencies and authorities are liable to prosecution as well, and that is what did not occur in the previous act ... Essentially, what this amendment is trying to do is to ensure that, for instance, if a government agency or a government department deliberately, knowingly damages a particular site, then they too will be responsible, just as are other citizens of the Northern Territory."

316 The Minister then invited the defeat of cl 4 as proposed and that an amended version of cl 4 be passed. The Minister described the amendment as "the new clause 4 which clarifies the extent to which that act binds the Crown, and specifically the liability of the Crown to prosecution for offences under that act".[495] The amended cl 4 became s 4 of the Act as amended.[496] As noted, amongst other things, the amended cl 4 changed references to "the Crown" in certain sub-sections

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494 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1351.

495 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 December 2005 at 1352.

496 See the terms of s 4 as amended – and as currently worded – at [254] above.

of s 4 to the "Territory Crown" and defined "Territory Crown" to mean "the Crown in right of the Territory".

317 Again, understood in context, the objective intention of the provisions as amended is clear.

318 Section 4(1) rebuts any post-*Bropho* presumption that the Sacred Sites Act does not bind the Crown – including servants, agents, manifestations, alter egos, or emanations of the Crown – be it the Crown in right of any State or Territory, or the Commonwealth. That provision did not substantively change.

319 Section 4(2) recognises that the flexible post-*Bropho* presumption that a statute does not bind the Crown in right of any State or the Territory, or the Commonwealth, is different from the strong *Cain v Doyle* presumption against any statute imposing criminal liability on the Crown in right of any State or Territory, or the Commonwealth, understood as the body politic or government of that State or Territory, or the Commonwealth. Section 4(2) recognises that s 4(1) may well have been insufficient to impose such criminal liability on any such body politic. As enacted (in contrast to as proposed), s 4(2) imposed such criminal liability on, and confined it to, the Territory Crown and made the Territory Crown liable in that capacity to be prosecuted for an offence as if it were a body corporate. It did not impose criminal liability on the Crown in right of any State, another Territory, or the Commonwealth understood as the body politic or government of that State or Territory, or the Commonwealth.

320 Section 4(3), in saying that the "section does not affect any liability of an officer, employee or agent of the Territory Crown to be prosecuted for an offence", is to be understood as reflecting the confinement of s 4(2) to the Territory Crown. It is not to be understood as meaning that an officer, employee, or agent of another Crown (being a natural person or body corporate) was not able to be prosecuted for an offence against the Act. That was never the law and no intention to alter that orthodoxy is apparent once the full context of the amendments is understood. In that full context, the silence of s 4(3) about officers, employees, or agents of the Crown does not carry any implication that, contrary to orthodoxy, such officers, employees, and agents (being a natural person or body corporate) are immune from prosecution for an offence against the Act, even if those persons are acting on behalf of the Crown (Commonwealth, State, or Territory).

321 Section 4(4), in saying that an Agency (meaning a Northern Territory Agency) and an authority or instrumentality of the Territory Crown are included within the Territory Crown, is not to be understood as indicating that the authorities or instrumentalities of the Crown (Commonwealth, State, or Territory) are to be taken to be the Crown in right of the body politic for the purpose of s 4(2). This means that there also can be no negative implication from s 4(2) (its silence about the Crown in right of any State, another Territory, or the Commonwealth) to the effect that the authorities or instrumentalities of the Crown in right of any State,

another Territory, or the Commonwealth are intended to be, in common with the Crown in right of their respective bodies politic, outside of the penal provisions of the Act.

322 In other words, s 4 of the Sacred Sites Act is to be construed on the basis that the *Cain v Doyle* presumption never applied to servants, agents, manifestations, alter egos, or emanations of the Crown to protect those persons or bodies from criminal liability. The *Cain v Doyle* presumption operates only in favour of the Crown in right of a body politic conducting itself for its governmental purposes. Section 4 rebuts the *Cain v Doyle* presumption for the Crown in right of the body politic of the Northern Territory but does not rebut the *Cain v Doyle* presumption for the Crown in right of the body politic of any State, another Territory, or the Commonwealth. Section 4 also does not, by express words or implication, change the law so that a servant, agent, manifestation, alter ego, or emanation of any other Crown may claim the Crown's immunity from prosecution for an offence. Such a servant, agent, manifestation, alter ego, or emanation may be prosecuted for an offence against s 34(1) if they are either a natural person or a body corporate, subject of course to the Commonwealth's power to make legislation which will prevail over any inconsistent State or Territory legislation under s 109 of the *Constitution* or any other constitutional constraint (none of which were suggested in the present case).

323 The DNP, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), is a body corporate. As there is no provision in the *Environment Protection and Biodiversity Conservation Act* said to engage s 109 of the *Constitution*, the Sacred Sites Act operates in accordance with its terms. The DNP is a body corporate able to be prosecuted for an offence against s 34(1) of the Sacred Sites Act. As noted, resolution of this single issue of statutory construction – does s 34(1) impose criminal liability on the DNP as a body corporate – is sufficient to resolve the second respondent's two arguments.

324 The appeal should be allowed. The orders proposed in the reasons for judgment of Gordon and Gleeson JJ should be made.