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A WOLF IN SHEEP'S CLOTHING? CROWN IMMUNITY IN *CHIEF EXECUTIVE OFFICER, ABORIGINAL AREAS PROTECTION AUTHORITY V DIRECTOR OF NATIONAL PARKS* (2024) 418 ALR 202

> 'The king has two bodies. The first exists within the limits of his physical being; you measure it, and Henry often does, his waist, his calf, his other parts. The second is his princely double, free-floating, untethered, weightless, which may be in more than one place at a time. Henry may be hunting in the forest, while his princely double makes laws. One fights, one prays for peace. One is wreathed in the mystery of his kingship: one is eating a duckling with sweet green peas.'[1]

I Introduction

The Crown occupies a unique and contentious position in Australian law,[2] wielding considerable authority while being shielded by principles of immunity that shape its position within statutory regimes. As government functions expand and become more complex, the residual prerogative powers of the Crown and its instrumentalities become increasingly difficult to justify.[3] The High Court's decision in *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* ('*AAPA v DNP*')[4] highlights this ongoing tension. Across five judgments, the Court considered the question of whether the Director of National Parks ('DNP') — a body corporate and an instrumentality of the Commonwealth Crown — could be found criminally liable for offending at Gunlom Falls in Kakadu National Park.[5] The Court ultimately held that, as a matter of statutory

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1 Hilary Mantel, *Wolf Hall* (4th Estate, 2019) 480.

2 See generally: Nick Seddon, 'The Crown' (2000) 28(2) *Federal Law Review* 245; Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4th ed, 2011); Steven Churches, 'The Shield of the Crown in England and Australia: The Need for Statutory Interpretation that Applies the Principle of Legality' (2011) 22(3) *Public Law Review* 182.

3 See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No 92, 25 October 2001) 512 [26.38]–[26.39].

4 (2024) 418 ALR 202 ('*AAPA v DNP*').

5 Ibid 204–5 [1] (Gageler CJ and Beech-Jones J), 211 [33] (Gordon and Gleeson JJ), 234 [125]–[126] (Edelman J).

construction, the body corporate was liable and could not rely on any immunity otherwise afforded to the Crown under the common law.[6]

The case presented an opportunity for the Court to rethink the orthodoxy of the notion of 'the Crown' and its associated immunities. Despite reaching a unanimous conclusion which held accountable a government instrumentality, the Court was apprehensive to revise the English constitutional tradition of the Crown and its associated immunities. Part II of this case note outlines the factual and procedural background of the case, the relevant statutory context, as well as the broader position of the Crown within Australia's federal system. Part III sets out the Court's decision, in particular, its approach to statutory construction and the application of the presumptions of Crown immunity. Part IV comments on the implications of the decision and considers whether more substantial revision of the presumptions is required to clarify the position of the Crown and reconcile its incongruencies in Australia's federal system. It ultimately concludes that the decision in *AAPA v DNP* represents an opportunity missed.

II The Case

A *Factual and Procedural Background*

The decision in *AAPA v DNP* arose from an offence which transpired at Gunlom Falls in Kakadu National Park in the Northern Territory, a site sacred to the Jawoyn people.[7] In 2019, the respondent, the DNP, engaged a contractor to carry out construction works on a walking track near Gunlom Falls, inadvertently damaging the site.[8] The DNP did so without seeking the necessary authorisation from the Aboriginal Areas Protection Authority ('AAPA'), or a certificate granted by the relevant Minister under s 4(2) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ('*Sacred Sites Act*').[9] On 11 September 2020, the appellant, the Chief Executive Officer ('CEO') of the AAPA, charged the DNP with an offence under s 34(1) of the *Sacred Sites Act*, which prohibits a 'person' from carrying out work on or using a sacred site without a certificate issued under the Act.[10]

At first instance before the Northern Territory Local Court, the Commonwealth Attorney-General ('Attorney-General') intervened,[11] contending that the DNP was

6 Ibid 205 [2], 211 [31]–[32] (Gageler CJ and Beech-Jones J), 211 [33], 221 [77], 231 [114] (Gordon and Gleeson JJ), 234 [125]–[126], 263–4 [240] (Edelman J), 264–5 [246] (Steward J), 283 [323]–[324] (Jagot J).

7 See *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 3 (definition of 'sacred site') ('*Sacred Sites Act*').

8 *AAPA v DNP* (n 4) 212 [36] (Gordon and Gleeson JJ), 235 [130] (Edelman J).

9 Ibid.

10 Ibid 235 [131] (Edelman J).

11 *Judiciary Act 1903* (Cth) s 78A.

not liable to prosecution under the *Sacred Sites Act*.[12] Consequently, the Local Court referred the matter, as a special case, to the Full Court of the Supreme Court.[13] In those proceedings, the DNP conceded that the facts presented amounted to an offence under s 34(1) of the *Sacred Sites Act*. However, it pleaded not guilty, asserting that the presumption against criminal liability for the Crown prevented conviction.[14] The Full Court agreed, holding that s 34(1) of the *Sacred Sites Act* did not apply to the DNP as it enjoyed the Crown's privileges and immunities in the right of the Commonwealth, including immunity from criminal liability.[15] The CEO of the AAPA was granted special leave to appeal that decision to the High Court.[16]

B *Legal Context*

At the core of this decision are two 'overlapping' common law presumptions.[17] The first presumption is that established in *Cain v Doyle*.[18] In that case, Dixon J, with whom Rich J agreed,[19] held that a statute should be presumed not to impose criminal liability on the Crown in the absence of 'quite certain indications that the legislature had adverted to the matter and had … resolved upon so important and serious a course'.[20] In establishing this rule, Dixon J noted 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'.[21] The operation of this presumption is 'strong but narrow', in that it applies to bodies politic and their emanations but not to natural persons or bodies corporate.[22]

The second of the two presumptions was outlined in *Bropho v Western Australia* ('*Bropho*').[23] It stands for the general proposition that statutes do not bind the Crown unless a legislative intent to bind the Crown is found 'in the provisions of the statute — including its subject matter and disclosed purpose and policy — when

12 *AAPA v DNP* (n 4) 205 [6] (Gageler CJ and Beech-Jones J).

13 Ibid 212 [37] (Gordon and Gleeson JJ), 682 [131] (Edelman J). See also *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1, [2]–[3] (Grant CJ, Southwood and Barr JJ).

14 *AAPA v DNP* (n 4) 212 [37] (Gordon and Gleeson JJ).

15 *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1, [81] (Grant CJ, Southwood and Barr JJ).

16 *AAPA v DNP* (n 4) 212 [39] (Gordon and Gleeson JJ).

17 Ibid 205 [6] (Gageler CJ and Beech-Jones J).

18 (1946) 72 CLR 409.

19 Ibid 419.

20 Ibid 424.

21 Ibid 425.

22 *AAPA v DNP* (n 4) 211 [30] (Gordon and Gleeson JJ).

23 (1990) 171 CLR 1 ('*Bropho*').

construed in a context which includes permissible extrinsic aids'.[24] The presumption is comparatively more 'flexible' than the *Cain v Doyle* presumption.[25]

C *Issue and Applicable Legislation*

On appeal, the question before the Court was a 'narrow' one:[26] can the DNP — a statutory corporation and therefore an instrumentality of the Commonwealth — be criminally liable under s 34(1) of the *Sacred Sites Act*? The answer to the question turned on the proper construction of that provision, set out in the following terms:[27]

> **34 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.

Under s 514E(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the DNP is established as a body corporate and may sue and be sued in its corporate name. Further, under ss 17 and 24AA of the *Interpretation Act 1978* (NT), reference to a 'person' includes 'a body politic and a body corporate'.

Accordingly, the more intricate issue to be resolved by the Court was whether s 34(1) of the *Sacred Sites Act* should be interpreted as having 'no penal application' to the DNP as a Crown instrumentality.[28] Section 4 of the *Sacred Sites Act* provides:

> **4 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.

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24 Ibid 21–4 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), 28 (Brennan J).

25 *AAPA v DNP* (n 4) 276 [290] (Edelman J).

26 Ibid 212–3 [40] (Gordon and Gleeson JJ).

27 *Sacred Sites Act* (n 7) s 34.

28 *AAPA v DNP* (n 4) 205 [6] (Gageler CJ and Beech-Jones J).

> (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.[29]

Relying on the presumptions in *Cain v Doyle* and *Bropho*, the Attorney-General argued that s 4 contained a negative implication that 'immunised from criminal liability both the body politic of the Commonwealth and … [entities] … treated as having the same status' under the law.[30] It was therefore submitted that s 34(1) ought to be read down so as to not bind or make liable the DNP.[31]

III The Decision

Despite handing down its decision in five separate judgments,[32] all seven members of the Court reached the same conclusion: the appeal was allowed, the Full Court's determination on the question of law was set aside, and the DNP was held liable under s 34(1) of the *Sacred Sites Act* as a matter of statutory construction.[33] In light of the unanimous conclusion reached, for the purposes of this case note, the separate judgments will be addressed collectively.

A *Proper Statutory Construction*

In determining how s 34(1) of the *Sacred Sites Act* ought to be construed, Gageler CJ and Beech-Jones J observed there was 'no room for doubt' that the provision operated to bind bodies corporate.[34] The legislative intent to do so was made clear from the provision's differing penalties for natural persons and bodies corporate.[35] However, the question remained as to whether ss 4(2) and (4) of the *Sacred Sites Act* created a negative implication excluding instrumentalities of the Commonwealth from liability under s 34(1). Justices Gordon and Gleeson observed that both parties accepted this inference from the sub-sections' text, noting that 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'.[36]

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29 *Sacred Sites Act* (n 7) s 4 (emphasis added).

30 *AAPA v DNP* (n 4) 261 [228] (Edelman J).

31 Ibid 205 [6] (Gageler CJ and Beech-Jones J), 262 [232] (Edelman J).

32 Joint reasons were published by Gageler CJ and Beech-Jones J, and Gordon and Gleeson JJ respectively. Single judgments were published by Edelman, Steward, and Jagot JJ.

33 *AAPA v DNP* (n 4) 211 [31]–[32] (Gageler CJ and Beech-Jones J), 232 [118] (Gordon and Gleeson JJ), 263 [240] (Edelman J), 265 [248] (Steward J), 283 [324] (Jagot J).

34 Ibid 205 [4].

35 Ibid.

36 Ibid 220 [72].

The majority of the Court rejected the Attorney-General's submission that the text, context and history of ss 4(2)–(4) evinced legislative intention to exclude from liability Commonwealth statutory corporations.[37] Three of the judgments referenced the second reading speech of the Northern Territory Aboriginal Sacred Sites Amendment Bill 2005 (NT) ('Amendment Bill'), where intentions to enhance 'the protection of sacred sites and the desire for wider accountability' were clearly laid out.[38] While debate on the Amendment Bill ultimately led to the narrowing of ss 4(2) and (4), the wording of s 4(3) made it clear that officers, employees and agents of the Crown could be subject to criminal prosecution under the *Sacred Sites Act*.[39]

As such, for at least four of the Justices, it was clear from the text, context and history of ss 4(2) to (4) of the *Sacred Sites Act* that the legislative intent was not to exclude incorporated bodies of the Commonwealth, States and Australian Capital Territory from liability under the Act.[40] Consequently, there was no basis under s 4 to allow the Court to read down the application of s 34(1) as excluding the DNP from criminal liability for their breach of the provision. The residual question before the Court, therefore, was whether either of the presumptions set out in *Cain v Doyle* and *Bropho* afforded the DNP immunity as an instrumentality of the Crown.

B *The Presumptions*

A majority of the Court treated the presumptions as distinct, though Gordon and Gleeson JJ observed that they 'are sometimes described as part of one presumption existing on a continuum'.[41] Conversely, Edelman J characterised the *Bropho* presumption as a restatement of the *Cain v Doyle* presumption.[42]

Regarding the application of the *Bropho* presumption in *AAPA v DNP*, a majority of the Court concluded that it was expressly rebutted by the text of s 4 of the *Sacred Sites Act*, which was reinforced by the context of the Amendment Bill.[43] The *Bropho* presumption was confirmed to be the 'weaker' of the two presumptions, in that it applies 'unless a contrary intention can be discerned from all the relevant circumstances'.[44] In the context of *AAPA v DNP*, s 4 evinced a clear intention to bind the Crown in right of the Commonwealth. There was no negative implication

37 Ibid 221 [75]–[76] (Gordon and Gleeson JJ), 261–2 [228]–[230] (Edelman J), 282–3 [320]–[322] (Jagot J).

38 Ibid 219–20 [69]–[71] (Gordon and Gleeson JJ), 259–61 [219]–[229], 263 [238] (Edelman J), 281–282 [313]–[316] (Jagot J).

39 Ibid 259–60 [219]–[221] (Edelman J).

40 Ibid 221 [76] (Gordon and Gleeson JJ), 263 [239] (Edelman J), 282 [316]–[317] (Jagot J).

41 Ibid 214 [43] (Gordon and Gleeson JJ).

42 Ibid 246–8 [168]–[175] (Edelman J).

43 Ibid 207 [13] (Gageler CJ and Beech-Jones J), 218 [61]–[62] (Gordon and Gleeson JJ), 282 [318] (Jagot J).

44 Ibid 206–7 [11] (Gageler CJ and Beech-Jones J).

under ss 4(2) to (4) that excluded liability of bodies corporate, employees and agents acting in the course of their official functions or duties, irrespective of their status as instrumentalities of the Crown.[45]

As to the *Cain v Doyle* presumption, the Court unanimously held that the presumption's application was confined to a body politic, not to its agents or corporate entities.[46] Accordingly, the DNP — being a statutory corporation with a legal personality distinct from the body politic of the Commonwealth — could not enjoy immunity under the presumption, and was therefore liable under s 34(1).

In considering the presumption, Jagot J examined its historical evolution, which stemmed from the maxim 'the king can do no wrong'. Her Honour clarified that it applies not only to the Crown of the enacting jurisdiction, but also to the Crown of other jurisdictions within the Federation.[47] Justice Edelman, alternatively, went much further in criticising Dixon J's dicta in *Cain v Doyle*, arguing that its foundations were 'or [are] now, based on a mistaken understanding of the law or a misconceived attempt bluntly to apply English constitutional concepts to Australian law after 1901'.[48]

C *Outcome*

Upon the case returning to the Local Court, the DNP was ultimately found guilty of an offence under s 34(1) in of the *Sacred Sites Act* and was fined $200,000. While this outcome marks a step forward in upholding statutory accountability, the decision in *AAPA v DNP* arguably falls short of offering a more principled solution to the conceptual issues surrounding Crown immunity.

IV Comment

In *AAPA v DNP*, Gageler CJ and Beech-Jones J expressly denied the need to reverse or substantially revise the orthodox position regarding Crown immunity.[49] It was suggested that doing so 'would destabilise well-entrenched legislative

45 Ibid 215 [47] (Gordon and Gleeson JJ). Chief Justice Gageler and Beech-Jones J seemed to agree at 206–7 [11]. Justice Jagot observed that immunity for servants and agents of the Crown had to be expressly stated in statute: at 279 [301]. Justice Edelman commented that the inference of immunity from liability will rarely be drawn where the subject of the immunity is officers, employees, or other agents (including statutory corporations) of the Crown: at 250 [181].

46 Ibid 210–1 [26]–[30] (Gageler CJ and Beech-Jones J), 212 [39], 221 [77], 223 [83], 227–9 [102]–[105] (Gordon and Gleeson JJ), 263 [237] (Edelman J), 264 [244] (Steward J), 279 [303], 283 [322] (Jagot J).

47 Ibid 267 [261]–[262], 267–8 [264], 279 [303] (Jagot J). See also 207–8 [15] (Gageler CJ and Beech-Jones J).

48 Ibid 242–3 [155].

49 Ibid 209–10 [24].

assumptions'.[50] However, as noted by Edelman J, the presumption set out in *Cain v Doyle* represents an 'anachronism' — its application to a modern, post-Federation Australia has become incongruous and confusing.

A *An Inapt Inheritance?*

Australia inherited the British constitutional tradition of 'the Crown', with the term initially referring simply to the Monarch, effectively symbolising the United Kingdom.[51] Even in its British origins, the notion of 'the Crown' and associated prerogative powers attracted criticism, once described as a 'convenient cover for ignorance [that] saves us from asking difficult questions', obscuring the true nature of state power.[52] Following Australia's Federation in 1901, the term's use invited further critique for its vagueness, inequities, and questionable practical relevance.[53]

Over time, 'the Crown' has increasingly been used to denote the executive branch of government, including Ministers and their agents. However, in Australia's federal system, the continued use of the terminology is complex. In *Sue v Hill*, 'the Crown' was identified as having no fewer than five meanings,[54] with the Court expressing doubt as to some of their relevance in Australia. In *AAPA v DNP*, Edelman J described the term as 'slippery' and 'capable of various meanings'.[55]

As observed by Steven Churches, '[t]he concept of "the Crown" is not a term of art' in the *Constitution*.[56] In *Bass v Permanent Trustee Co Ltd*, the majority of the Court observed that Australia's federal structure rendered expressions such as 'binding the Crown' or 'binding the Crown in right of the Commonwealth' as 'inappropriate and potentially misleading when the issue is whether the legislation of one polity in the federation applies to another'.[57] This was similarly recognised by Gageler CJ and Beech-Jones J in *AAPA v DNP*; their Honours noted that while it 'might have been expected at federation that each body politic would be referred to in legislation simply as "the Commonwealth" or "a State"', the tradition of referring to 'the Crown' has endured.[58]

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50 Ibid.

51 Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873, 884–5.

52 F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 418.

53 See Pitt Cobbett, 'The Crown as Representing the State' (1904) 1(4) *Commonwealth Law Review* 145, 146–7.

54 (1999) 199 CLR 462, 497–503 (Gleeson CJ, Gummow and Hayne JJ).

55 *AAPA v DNP* (n 4) 237 [140] (Edelman J).

56 Churches (n 2) 191.

57 (1999) 198 CLR 334, 347 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

58 *AAPA v DNP* (n 4) 661 [9] (Gageler CJ and Beech-Jones JJ).

B *Reimagining the Body Politic*

The presumption of Crown immunity is not merely an inapt relic of British constitutional tradition, but a significant obstacle to the rule of law and equality before the law. At the time the various Crown immunities were developed, 'governments engaged in only a narrow range of activities' which rarely extended to commercial enterprise.[59] The immunities were therefore accepted then because of their modest impact.[60] However, government activities became increasingly driven by economic and political pressures to commercialise and privatise government-owned business and infrastructure.[61] Within this context, the foundations of the concept become questionable.

1 *Parity*

The *Constitution* is framed upon the assumption of the rule of law.[62] It is expected 'that Government should be under law, that the law should apply to and be observed by Government and its agencies … just as it applies to the ordinary citizen',[63] including criminal law.[64] The presumption in *Cain v Doyle* is at odds with these principles. As Gibbs CJ observed in *Townsville Hospitals Board v Council of the City of Townsville*, '[a]ll persons should prima facie be regarded as equal before the law'.[65] In *AAPA v DNP*, the Court declined to reconsider the two presumptions despite their ostensible lack of parity. That approach was implicitly justified by the Court on the basis that the application of one rule was 'narrow'[66] and the other 'flexible'.[67]

2 *Practicality*

In contemporary Australia, the activities of the Crown extend to 'multifarious functions',[68] including various governmental, commercial, industrial and developmental

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59 Australian Law Reform Commission (n 3) 409 [22.39].

60 Ibid.

61 See generally Darrell Barnett, 'Statutory Corporations and "the Crown"' (2005) 28(1) *UNSW Law Journal* 186.

62 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

63 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 540 [91] (Gordon and Steward JJ), citing Sir Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue* 8, 8.

64 *A v Hayden (No 2)* (1984) 156 CLR 532, 580 (Brennan J); *Ridgeway v The Queen* (1995) 184 CLR 19, 29 (Mason CJ, Deane and Dawson JJ), 54 (Brennan J), 59 (Toohey J), 73 (Gaudron J), 81 (McHugh J).

65 (1982) 149 CLR 282, 291.

66 *AAPA v DNP* (n 4) 211 [30] (Gordon and Gleeson JJ).

67 Ibid 276 [290] (Edelman J).

68 *Jacobsen v Rogers* (1995) 182 CLR 572, 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

activities. In *AAPA v DNP*, the Court accepted the diversity of the functions of the Crown, but emphasised that it is unlikely Parliament would intend to grant immunity from prosecution to employees or agents engaged in these functions if they act unlawfully.[69] This was an issue central to the decision in *Bropho*, and therefore the position adopted in this case is the prevailing position in relation to the interpretation legislation enacted or amended subsequent to *Bropho* (including the *Sacred Sites Act*). However, as the presumption in *Bropho* is often regarded as distinct from the presumption in *Cain v Doyle*, rather than a reformulation as Edelman J suggested,[70] the issue of whether to overturn or restate the latter presumption was dealt with in surprising brevity in many of the judgments. Despite canvassing the various problematic aspects of the principles established in *Cain v Doyle*, in response to the CEO of the AAPA's calls to revise the presumption, the issue was rejected on arguably limited reasons.[71] For instance, Gageler CJ and Beech-Jones J explained their rejection on the basis that the *Cain v Doyle* presumption 'has been repeatedly acknowledged in this Court in the years since *Bropho*', and to overturn it would 'destabilise well-entrenched legislative assumptions'.[72]

V Conclusion

In Australia's federal structure, a reconsideration or simplification of Crown immunity — and perhaps even the terminology of 'the Crown' itself — would lead to greater certainty and parity in the law, in addition to better reflecting Australia's constitutional setting. While this opportunity was presented in *AAPA v DNP*, the decision reflects the Court's overall apprehension to depart from orthodoxy. By rejecting the DNP's claim for immunity, the Court underscored the primacy of legislative intent in determining liability, while also providing a reminder that the Crown cannot remain an enigmatic entity in modern governance. However, the decision also leaves unresolved tensions. The persistence of outdated legal principles like those in *Cain v Doyle* continue to muddy the waters. As such, resolving the ambiguities and incongruences of Crown immunity at common law may be an issue best left to legislative intervention, for example, through reversing the presumption while retaining judicial discretion to determine when a statute exempts the Crown.[73]

69 *AAPA v DNP* (n 4) 250 [182]–[183], 251 [185] (Edelman J), 275 [288] (Jagot J).

70 Ibid 242 [154] (Edelman J).

71 Ibid 209–10 [20]–[24] (Gageler CJ and Beech-Jones J), 211 [30] (Gordon and Gleeson JJ).

72 Ibid 209–10 [24] (Gageler CJ and Beech-Jones J).

73 Australian Law Reform Commission (n 3) 509–15 [26.27]–[26.41].