IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY **NO D4 OF 2018**

ON APPEAL FROM THE COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

BETWEEN: **WORK HEALTH AUTHORITY**
Appellant

AND: **OUTBACK BALLOONING PTY LTD**
First Respondent

DAVID BAMBER
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening) by:

The Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

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Telephone: 02 6253 7203 / 02 6253 7327
Lawyer's e-mail: Gavin.Loughton@ags.gov.au / Danielle.Gatehouse@ags.gov.au
Facsimile: 02 9581 7413

PART I FORM OF SUBMISSIONS

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

PARTS II AND III INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

PART IV ISSUES PRESENTED BY THE APPEAL

3. Ms Stephanie Bernoth died from injuries she suffered whilst boarding a hot-air balloon operated by the First Respondent. The First Respondent was charged with an offence against s 32 of the *Work Health and Safety (National Uniform Legislation) Act* (NT) (**NT WHS Act**) for failing to comply with the 'health and safety duty' imposed upon it by s 19(2) of that Act [**ABFM 33**].

4. The issue in this appeal is whether s 32 (read with ss 19(2) or 27) is 'repugnant' to several laws of the Commonwealth (together, **the Commonwealth Law**) that concern the safety of air navigation,[1] and therefore invalid at least to the extent that s 32 of the NT WHS Act does not operate in the circumstances of this case.

5. In summary, the Commonwealth submits that there is no repugnancy because:

   5.1. to the extent that the Commonwealth Law addresses workplace health and safety in the context of civil aviation, it does not evince an intention to provide a complete or exhaustive statement of the law on that subject. To the contrary, it is supplementary to the State/Territory laws concerning workplace health and safety;

   5.2. further, and in any event, even if the Commonwealth Law contains a negative implication that it is to be the only law upon the subject of the 'safety of air navigation', the NT WHS Act is not inconsistent with that negative implication because it is *not* a law 'upon the same subject matter'.[2] That is so even in circumstances where the NT WHS Act applies to facts to which the Commonwealth Law also applies.

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1 Namely the *Air Navigation Act 1920* (Cth) (***Air Navigation Act***), the *Civil Aviation Act 1988* (Cth) (***CAA***), the *Civil Aviation Regulations 1988* (Cth) (***CAR***), the *Civil Aviation Safety Regulations 1998* (Cth) (***CASR***), and certain Civil Aviation Orders (**CAOs**) made by the Civil Aviation Safety Authority (**CASA**).

2 *Momcilovic v The Queen* (2011) 245 CLR 1 at 116 [261] (Gummow J).

Repugnancy between Commonwealth and Northern Territory laws

6. The issue in this appeal concerns an asserted inconsistency between several laws of the Commonwealth and a law made by the Legislative Assembly of the Northern Territory. That issue is not governed by s 109 of the Constitution, the terms of which 'are not addressed to the relationship between laws of the Commonwealth and those enacted by legislatures in the territories'.[3] Nor can the issue be resolved by the application of a provision equivalent to s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth),[4] for the *Northern Territory (Self-Government) Act 1978* (Cth) contains no such provision.[5]

7. A conflict between a law of the Commonwealth and that of the Northern Territory is resolved by reference to the concept of 'repugnancy'. That concept is often associated with the relationship between laws of the Imperial Parliament and the laws of the Australian colonies, and later of the States,[6] and which found expression in the *Colonial Laws Validity Act 1865* (Imp).[7] It has been suggested that, for historical reasons, repugnancy under that Act may have entailed a stricter test than that posited by s 109.[8] It is unnecessary to determine whether that is so, because in the context of possible repugnancy between Commonwealth and Territory laws the concepts of 'repugnancy' and 'inconsistency' should be treated as interchangeable.[9] As Mason J stated in *University of Wollongong v Metwally*: 'a conflict between a Commonwealth law and a Territory law, which is unaffected by the provisions of s 109, is resolved in favour of the primacy of the Commonwealth law by reference to the same doctrine of inconsistency'.[10]

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3 *Northern Territory v GPAO* (1999) 196 CLR 553 at 580 [53] (Gleeson CJ and Gummow J).

4 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (***Marriage Equality Case***) at 465-467 [48]-[54], 469 [61] (The Court).

5 *GPAO* (1999) 196 CLR 553 at 583 [61] (Gleeson CJ and Gummow J). Note s 98(7) of the *CAA*, but this only applies to the 'regulations'. In any event, it would not avoid an indirect inconsistency between the regulations and territory law: *Marriage Equality Case* (2013) 250 CLR 441 at 466 [52] (The Court).

6 Leeming, *Resolving Conflicts of Law* (2011) at 100.

7 28 & 29 Vict c 63.

8 *Momcilovic* (2011) 245 CLR 1 at 102-103 [215] (Gummow J). See *Yougarla v Western Australia* (2001) 207 CLR 344 at 354-355 [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

9 See Leeming, *Resolving Conflicts of Law* (2011) at 91, see also at 85, 96-97, 135-136; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463-464 (Mason J).

10 (1984) 158 CLR 447 at 464. See also *GPAO* (1999) 196 CLR 553 at 581-582 [57]-[59] (Gleeson CJ and Gummow J, Hayne J agreeing at 650 [254]), 636 [219] (Kirby J); *Marriage Equality Case* (2013) 250 CLR 441 at 466 [52] (The Court).

8. That alignment of approach is sound as a matter of principle. If a narrower approach were applied to identifying inconsistency between Commonwealth and Territory law to that applied to identifying inconsistency between Commonwealth and State law, the consequence would be that a Commonwealth law of 'general application throughout the nation' that is intended to 'make exhaustive or exclusive provision on the subject with which it deals' would have exhaustive operation in the States, but not in the Territories.[11]

9. While the jurisprudence on s 109 may usefully be drawn upon to answer questions arising from application of the repugnancy principle, there remains an important difference in consequence: 'repugnancy affects the "power" to make a law, whereas inconsistency under s 109 affects only the operative effect of the law'.[12] The Legislative Assembly of the Northern Territory does not have legislative power to enact a law that is repugnant to an existing Commonwealth law.[13] A repugnant Territory law will therefore be *ultra vires* (rather than inoperative).[14]

Inconsistency under s 109 of the Constitution

10. It has long been recognised that the mere fact that a State/Territory law is capable of applying to the same factual circumstances to which the Commonwealth law applies is not itself sufficient to establish inconsistency for the purpose of s 109.[15] Rather, it is necessary to construe the Commonwealth law and the State/Territory law to discern whether a 'real conflict' exists between the two laws.[16]

11. Such a conflict may arise in a number of ways, including where: (1) two conflicting

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11 *GPAO* (1999) 196 CLR 553 at 581 [57] (Gleeson CJ and Gummow J), see also at 636-637 [221] (Kirby J); *Marriage Equality Case* (2013) 250 CLR 441 at 466 [52] (The Court).

12 Twomey, 'Inconsistency between Commonwealth and Territory Law' (2014) 42 *Federal Law Review* 421 at 423.

13 Save for those laws within the scope of s 57(3) of the *Northern Territory (Self-Government) Act 1978* (Cth). See *A-G (NT) v Hand* (1989) 25 FCR 345 at 366-367 (Lockhart J); *GPAO* (1999) 196 CLR 553 at 578-579 [42]-[49], 580-581 [54]-[55], 586 [75] (Gleeson CJ and Gummow J); Leeming, *Resolving Conflicts of Law* (2011) at 234-238.

14 cf Court of Appeal at **CAB 61 [27], 76 [73]**; Appellant's Submissions at [17]. One consequence of this is that s 59 of the *Interpretation Act* (NT) might apply in the case of 'repugnancy' between Commonwealth and NT laws, even though its State equivalents do not apply in the case of s 109 inconsistency: see *Bell Group NV (in liq) v Western Australia* (2016) 90 ALJR 655 at 669 [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

15 *Ex parte McLean* (1930) 43 CLR 472 at 485 (Dixon J); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218 (Gibbs CJ), 224 (Mason J); *McWaters v Day* (1989) 168 CLR 289 at 296 (The Court).

16 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42] (The Court); *Bell Group* (2016) 90 ALJR 655 at 665-666 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

duties are imposed by the two legislatures; (2) there is something in the nature of a right or privilege conferred by one legislature, and the other legislature seeks to impose some additional restrictions on the exercise of that right or privilege; and (3) where the Commonwealth law is intended as a complete, exhaustive or exclusive statement of the law governing a subject matter, and the State/Territory law governs the same subject matter.[17] In all of these cases, the State/Territory law 'alters, impairs or detracts' from the operation of the Commonwealth law.[18] These notions have in common the idea that the State law 'undermines' the Commonwealth law.[19]

12. In all cases, the 'starting point' for determining whether there is inconsistency must be 'an analysis of the laws in question and their true construction'.[20] It is necessary to begin with the Commonwealth law, before turning to consider the State/Territory law.[21] In a case that is said to involve the third class of inconsistency ('indirect' or 'covering the field' inconsistency), the task of construing the Commonwealth law can be analysed as involving two stages.

Stage 1: Identifying the subject matter of the Commonwealth Law

13. *First*, it is necessary to construe the Commonwealth law to identify the subject matter that is governed by the Commonwealth law.[22] The subject matter of the Commonwealth law is often referred to as the 'field' in which the Commonwealth law operates.[23]

14. The metaphor of the 'field' has long been criticised. For example, Evatt J observed that little assistance was to be derived from an analogy between the picture of a two-dimensional field and 'legislation with its infinite complexities and varieties'.[24]

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17 See *McLean* (1930) 43 CLR 472 at 483 (Dixon J); *Momcilovic* (2011) 245 CLR 1 at 110-112 [240]-[245], 116 [261] (Gummow J).

18 *Jemena* (2011) 244 CLR 508 at 524 [39] (The Court); *Marriage Equality Case* (2013) 250 CLR 441 at 468 [59] (The Court).

19 *Jemena* (2011) 244 CLR 508 at 525 [41] (The Court), cited in *Bell Group* (2016) 90 ALJR 655 at 665-666 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

20 *Bell Group* (2016) 90 ALJR 655 at 666 [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

21 See *Momcilovic* (2011) 245 CLR 1 at 111 [258] (Gummow J); *Marriage Equality Case* (2013) 250 CLR 441 at 467 [54] (The Court).

22 See *Momcilovic* (2011) 245 CLR 1 at 115 [258] (Gummow J); *McLean* (1930) 43 CLR 472 at 483 (Dixon J); *Marriage Equality Case* (2013) 250 CLR 441 at 466 [52] (The Court), citing *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136-137 (Dixon J); *Victoria v Commonwealth* (1937) 58 CLR 618 ***(The Kakariki)*** at 630 (Dixon J); 638 (Evatt J).

23 See *Jemena* (2011) 244 CLR 508 at 524 [40]. See also *McWaters* (1989) 168 CLR 289 at 296 (The Court).

24 *The Kakariki* (1937) 58 CLR 618 at 634. See also *Stock Motor Ploughs* (1932) 48 CLR 128 at 147 (Evatt J); *Momcilovic* (2011) 245 CLR 1 at 118 [264] (Gummow J).

The insight that the subject matter of a law is not 'two-dimensional' is valuable, for it highlights that the subject matter is not completely described simply by identifying the physical persons, things, activities or transactions which the law regulates. The subject matter(s) of the law is the regulation of persons, things, activities or transactions *by reason of their possession of some particular characteristic*. For that reason, two laws addressing the same persons, things, activities or transactions may have different subject matters, even when they apply to the same set of facts. As Goldsworthy has explained:[25]

> Subject matters describe groups of things according to certain defining characteristics: the things which possess the relevant characteristic(s) belong to the subject matter. But all things belong to many different subject matters by possessing a vast multitude of different characteristics: a man may be a husband, father, doctor, alien, justice of the peace, Victorian and so on, and a particular act may be one of payment, fraud, conversion, and interstate commerce at the same time. Laws also deal with physical things by virtue of relevant characteristics possessed by those things.

Stage 2: Determining whether Commonwealth law exclusively regulates its subject matter

15. *Second*, having identified the subject matter of the Commonwealth law, it is necessary to determine, through a process of statutory construction,[26] whether the Commonwealth law is intended to be a complete, exhaustive or exclusive statement of the law governing that subject matter.[27]

16. In that regard, it is not correct to speak of 'parts of a defined subject area' being exhaustively governed.[28] An analysis in those terms would indicate that the subject matter(s) of the Commonwealth law has not been described with sufficient accuracy or precision at the first stage. It may be, however, that a Commonwealth law governs two different subject matters, one of which the Commonwealth Parliament intends to govern exhaustively, and the other of which it does not.[29] That may in fact be the position with respect to the Commonwealth Law if, for example, it is properly construed as containing an exhaustive statement of the law governing the safety of aircraft in flight,

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25 Goldsworthy, 'Legal Rights, Subject Matters and Inconsistency' (1981) 7 *Adelaide Law Review* 487 at 500. See also Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976) at 105-106.

26 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 466 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also *Momcilovic* (2011) 245 CLR 1 at 74 [111] (French CJ), 116 [261] (Gummow J), 133-134 [315] (Hayne J), 189 [474] (Heydon J), 235 [638] (Crennan and Kiefel JJ).

27 *McLean* (1930) 43 CLR 472 at 483, 485 (Dixon J), approved in *McWaters* (1989) 168 CLR 289 at 295-296 (The Court); *Marriage Equality Case* (2013) 250 CLR 441 at 466 [52], 467-468 [57] (The Court).

28 See Leeming, *Resolving Conflicts of Laws* (2011) at 152-153.

29 See, eg, *Commonwealth v Western Australia* (1999) 196 CLR 392 at 415-416 [55], 416-417 [59] (Gleeson CJ and Gaudron J). See also Hanks, Gordon, and Hill, *Constitutional Law in Australia* (4th ed, 2018) at 316 [5.104](a).

but not with respect to other aspects of safety in the aviation industry (where there is no obvious imperative for a single system, and where there are more likely to be existing and comprehensive State/Territory laws). The possibility that Commonwealth law is exhaustive with respect to some subjects but not others highlights the utility of undertaking the analysis of the Commonwealth law in the two stages identified above. The two stages are interconnected, and the analysis undertaken at the second stage might prompt reconsideration of the analysis undertaken at the first stage. But they are conceptually distinct, and should not be conflated.

17. In cases where there is an express provision in the Commonwealth law that specifies whether or not the Commonwealth law is intended to be a complete, exhaustive or exclusive statement of the law on a particular subject matter, that will ordinarily answer the question of construction involved at the second stage (provided that the substantive provisions of the law are capable of supporting the express statement of intention).[30]

18. In the absence of such an express provision, the requisite intention may also be inferred from contextual matters, including the nature or subject matter of the law,[31] the overall legislative scheme,[32] the purpose of the law,[33] the legislative history, the pre-existing state of the law, and the mischief the law was intended to remedy.[34] In such a case, properly construed the Commonwealth law contains an implicit negative proposition that 'nothing other than what the federal law provides upon a particular subject matter is to be the subject of legislation'.[35]

19. However, care is required before identifying an implicit negative proposition of the above kind, because in many cases (including, as will be developed below, this case) the appropriate conclusion may be that the Commonwealth law was not intended to be exhaustive. The context may, for example, indicate that the Commonwealth law was

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30 See, eg, *John Holland v Victorian Workcover Authority* (2009) 239 CLR 518 at 527 [20] (The Court); *Momcilovic* (2011) 245 CLR 1 at 119-121 [266]-[272] (Gummow J), 238-239 [654] (Crennan and Kiefel JJ).

31 See, eg, *The Kakariki* (1937) 58 CLR 618 at 638 (Evatt J), referring to subject matters that 'practically permit only one system of law and one system of administration'.

32 See, eg, *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 592 (Fullagar J), where the Commonwealth law established a regime of an 'extremely elaborate and detailed character'.

33 See, eg, *Viskauskas v Niland* (1983) 153 CLR 280 at 292 (The Court), referring to legislation for the purpose of giving effect to a treaty.

34 See *Dickson v The Queen* (2010) 241 CLR 491 at 504-505 [23]-[24] (The Court).

35 *Momcilovic* (2011) 245 CLR 1 at 115 at 111 [244], 116 [261], 122 [276] (Gummow J); *Marriage Equality Case* (2013) 250 CLR 441 at 468 [59] (The Court).

intended to be 'supplementary to or cumulative upon' State/Territory law.[36] That is illustrated by *McWaters v Day*, which concerned a provision of the *Defence Force Discipline Act 1982* (Cth) that made it an offence for a 'defence member or a defence civilian' to drive 'a vehicle on service land while ... intoxicating liquor or a drug to such an extent as to be incapable of having proper control of the vehicle'. The issue was whether a general drink-driving offence under the *Traffic Act 1949* (Qld) was inconsistent with that provision. The High Court unanimously found there was no inconsistency. The Court reasoned that the Commonwealth offence formed part of the military disciplinary code established by the Discipline Act, the purpose of which was 'to create a disciplinary code for the promotion of the efficiency, good order and the discipline of the defence forces, and no more'.[37] That particular (and limited) purpose was said to be 'supplementary to, and not exclusive of, the ordinary criminal law'.[38] That is, the Commonwealth law was 'intended to operate as an additional, rather than a replacement, set of rights and duties' to those imposed by the ordinary criminal law.[39]

20. Similar reasoning was employed in *Commercial Radio Coffs Harbour Ltd v Fuller*.[40] The applicant had been granted a licence to operate a radio transmitter under the *Broadcasting and Television Act 1942* (Cth). In order to comply with the conditions on that licence, the applicant was required to erect a transmission tower. But in order to erect that tower, the consent of the Minister was required under the *Environmental Planning and Assessment Act 1979* (NSW). That consent was not forthcoming, causing the applicant to breach the licence conditions and creating the risk that the licence might be withdrawn. The High Court unanimously found there to be no inconsistency. In reaching that conclusion, '[t]he distillation of the scope and purpose of the federal law was of decisive importance'.[41] The purpose of the Commonwealth Act was narrow: 'to maintain the provision of high quality and technically efficient broadcasting services which are commercially viable and receptive to the needs of the community'.[42]

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36 *McLean* (1930) 43 CLR 472 at 483 (Dixon J), quoted in *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47 at 57 (Wilson, Deane, Dawson JJ).

37 *McWaters* (1989) 168 CLR 289 at 297 (The Court).

38 *McWaters* (1989) 168 CLR 289 at 299 (The Court).

39 *McWaters* (1989) 168 CLR 289 at 298 (The Court).

40 (1986) 161 CLR 47.

41 *Momcilovic* (2011) 245 CLR 1 at 115 [259] (Gummow J).

42 *Commercial Radio Coffs Harbour* (1986) 161 CLR 47 at 57 (Wilson, Deane, Dawson JJ).

It achieved that purpose by 'the prohibition of broadcasting except under licence granted subject to certain conditions'.[43] But as Wilson, Deane, Dawson JJ explained:[44]

> the relaxation of the prohibition by the granting of a licence does not confer an immunity from other laws, Commonwealth or State. The Act does not purport to lay down the whole legislative framework within which the activity of broadcasting is to be carried on. It is intended to operate within the setting of other laws with which the grantee of a licence will be required to comply.

21. If the Commonwealth law does *not*, either expressly or by implication, reveal an intention that it be the complete or exhaustive statement of the law on a particular subject matter, then a State/Territory law – even if upon the *same subject matter* as the Commonwealth law – will operate validly except to the extent that the State/Territory law otherwise alters, impairs or detracts from some substantive provision of the Commonwealth law (ie, except to the extent that there is a 'direct inconsistency').[45]

Law on different subject matters

22. Even where a Commonwealth law *does* (whether expressly or impliedly) reveal an intention that it be the complete or exhaustive statement of the law on a particular subject matter, that is not the end of the analysis. In such a case, the 'question then is whether the State [or Territory] law is upon the same subject matter as the federal law'.[46]

23. It is important to emphasise that, *irrespective of its subject matter*, a State/Territory law that alters, impairs or detracts from the substantive operation of a Commonwealth law is invalid to that extent.[47] However, where a State/Territory law does *not* alter, impair or detract from the substantive operation of a Commonwealth law, it will be inconsistent with that law *only* if it detracts from the negative proposition that 'nothing other than what the federal law provides upon a particular subject matter is to be the subject of

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43 *Commercial Radio Coffs Harbour* (1986) 161 CLR 47 at 57 (Wilson, Deane, Dawson JJ).

44 *Commercial Radio Coffs Harbour* (1986) 161 CLR 47 at 57 (Wilson, Deane, Dawson JJ).

45 See *Momcilovic* (2011) 245 CLR 1 at 116 [243]-[244] (Gummow J).

46 *Momcilovic* (2011) 245 CLR 1 at 116 [261] (Gummow J). As is detailed below, all the seminal early statements by Dixon J on (so called) 'covering the field' inconsistency say that it potentially arises when the Commonwealth and State laws are on the 'same' subject matter: see nn 51-52.

47 '[T]hat the subject matters of the two laws are not co-incident' is no answer to a 'direct' inconsistency case: *Telstra v Worthing* (1999) 197 CLR 61 at 78 [32] (The Court). See also *McLean* (1930) 43 CLR 472 at 485 (Dixon J); *Charles Marshall Pty Ltd v Collins* (1957) 96 CLR 1 at 8 (Privy Council); *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 at 157-158 (Latham CJ), 161 (Starke J).

legislation'.[48] Logically, a State/Territory law cannot be inconsistent with that negative proposition unless the State/Territory law concerns the same subject matter as the Commonwealth law. It is for that reason that, in an indirect inconsistency case, 'subject matter becomes very important'.[49]

24. In particular, it is 'crucial' to 'correctly characteris[e]' the State/Territory law,[50] in order to determine whether it purports to 'govern'[51] or 'apply'[52] to the *same* subject matter as the Commonwealth law. If it does, then the State/Territory law is inconsistent with the Commonwealth law to that extent.[53] If, however, State/Territory law governs or applies to a *different* subject matter to that of the Commonwealth law, inconsistency is 'less likely to occur than it is where the two laws are dealing with the same subject matter',[54] because in such a case the State/Territory law does not detract from the negative proposition that Commonwealth law exclusively governs its chosen subject matter.[55]

25. Accordingly, even in a case where a Commonwealth law provides a complete statement of the law on a particular subject, that law will not be inconsistent with a State/Territory law on a different subject, even if in some operations both laws apply to the same

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48 *Momcilovic* (2011) 245 CLR 1 at 111 [244], 116 [261] (Gummow J). See also *The Kakariki* (1937) 58 CLR 618 at 630 (Dixon J).

49 *Miller v Miller* (1978) 141 CLR 269 at 279 (Jacobs J).

50 *Jemena* (2011) 244 CLR 508 at 529 [58] (The Court). See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399 [202] (Gummow J).

51 *McLean* (1930) 43 CLR 472 at 483 (Dixon J). See also *Wenn v A-G (Vic)* (1948) 77 CLR 84 at 119-120 (Dixon J).

52 *The Kakariki* (1937) 58 CLR 618 at 630 (Dixon J).

53 Such a case would involve what Stephen J called a 'rival regimens': *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 250. See, eg, *Viskauskas* (1982) 153 CLR 280 at 295 (The Court), where both Acts dealt with 'the one subject'; *Marriage Equality Case* (2013) 250 CLR 441 at 468-469 [59]-[60] (The Court), where the ACT Act sought to operate within the same 'domain' as the Commonwealth Act. See also *Hume v Palmer* (1926) 37 CLR 467, as explained in *McLean* (1930) 43 CLR 472 at 483 (Dixon J).

54 *Clarke v Kerr* (1955) 94 CLR 489 at 505 (McTiernan, Williams, Fullagar and Taylor JJ), quoted in *Wardley* (1980) 142 CLR 237 at 250 (Stephen J). Inconsistency is 'less likely' (rather than impossible) because the potential for direct inconsistency remains.

55 See, eg, *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 553 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Clarke v Kerr* (1955) 94 CLR 489 at 505 (McTiernan, Williams, Fullagar and Taylor JJ); *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 187 (Privy Council); *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 121-122 (Kitto J); *Wardley* (1980) 142 CLR 237 at 248-250, 253 (Stephen J); *Commercial Radio Coffs Harbour* (1986) 161 CLR 47 at 58-59 (Wilson, Deane, Dawson JJ); *McWaters* (1989) 168 CLR 289 at 299 (The Court).

persons, things, activities or transactions.[56] As Gibbs CJ put it in *R v Winneke; Ex parte Gallagher*, 'the two laws may deal with different subject matters, so that each may validly apply in relation to the same set of facts'.[57]

26. In *Ex parte McLean*, Dixon J made the same point, when giving the well-known example of a provision in an award which expressly forbad shearers to injure sheep. His Honour indicated that that provision would not be inconsistent with a State criminal law against the unlawful and malicious wounding of an animal, notwithstanding that the award provided 'the exclusive measure of industrial rights and duties between the disputants'.[58] His Honour suggested that 'provisions of State law which prohibit acts or omissions irrespective of the relation of employer and employed, and without regard to any other industrial relation or matter' were not superseded under s 109 'merely because it happens that in their industrial aspect *the same acts or omissions* ... are forbidden by Federal award'.[59] The reason both laws could apply to the same acts and omissions is because, as Goldsworthy has explained: 'when a State law deals with a thing which falls within a "covered field", but by virtue of a characteristic of no relevance to that field, it cannot be said that the State law "enters the field"'.[60]

27. The above reasoning explains why Commonwealth laws on the safety of air navigation are not inconsistent with State/Territory criminal laws that may be attracted by acts involving air navigation.[61] Indeed, if Commonwealth laws regulating the safety of air navigation were treated as a complete statement of the law applying to any *facts* concerning the safety of air navigation, the consequence would be that if a person operated a plane to commit murder (eg, deliberately flying into a group of people) he or she would be immune from State/Territory criminal law on that issue.[62] It would be artificial in the extreme to interpret the relevant Commonwealth laws as containing a

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56 See *New South Wales v Commonwealth (Hospital Benefits Case)* (1983) 151 CLR 302 at 319-320 (Gibbs CJ, Murphy and Wilson JJ), 326-328 (Mason J), referred to in *Jemena* (2011) 244 CLR 508 at 529 [58] (The Court).

57 (1982) 152 CLR 211 at 218, see also at 220-221 (Mason J), 232-333 (Wilson J), each cited with approval in *Viskauskas* (1982) 153 CLR 280 at 295 (The Court).

58 *McLean* (1930) 43 CLR 472 at 485-486 (Dixon J).

59 *McLean* (1930) 43 CLR 472 at 486 (Dixon J) (*emphasis* added).

60 Goldsworthy, 'Legal Rights, Subject Matters and Inconsistency' (1981) 7 *Adelaide Law Review* 487 at 500, see also at 501.

61 See, eg, *R v Morris* [2004] QCA 408 at [7] (McPherson JA), [40] (Williams JA), [51] (White J).

62 See *McWaters* (1989) 168 CLR 289 at 298 (The Court).

negative implication that State/Territory criminal laws cannot operate in those circumstances, simply because the facts that attract the operation of those laws also attract regulation (for different purposes, and with fundamentally different consequences)[63] under Commonwealth law.

The Court of Appeal's reasoning

28. Justice Southwood (with whom Blokland J agreed) observed at **CAB 60 [24]** that the test for indirect inconsistency required consideration of the following issues:

> (a) Whether the Commonwealth law is intended to be an exhaustive statement of the law on that subject matter.
>
> (b) The extent of the field occupied by the Commonwealth law.
>
> (c) Whether the Territory law attempts to regulate the same subject matter.
>
> (d) Whether there is a 'real conflict' between the two laws.

29. His Honour concluded at **CAB 60-61 [25]** that issue (a) had been resolved by *Heli-Aust Pty Ltd v Cahill* (***Heli-Aust***).[64] His Honour therefore determined that only issues (b), (c) and (d) fell for consideration. Justice Southwood therefore proceeded on the basis that the relevant Commonwealth laws were intended to be exhaustive in respect of the matters they dealt with, and so the only question was whether they dealt with the loading of passengers onto a balloon. In doing so, his Honour assumed that if a Commonwealth Law is exhaustive with respect to part of its subject matter, it is exhaustive with respect to its entire subject matter. The result was a failure to engage with the second stage of the inquiry explained above which, for the reasons addressed below, should have led to the opposite conclusion.

30. Further, having concluded in relation to issue (b) at **CAB 69 [52]** that 'the field of operation of Commonwealth civil aviation law extends to the loading of the passengers onto the balloon in this case', the Court simply assumed that Territory law could not validly apply to facts concerning the loading of the passengers onto the balloon. However, at no stage did the Court analyse whether the NT WHS Act regulated the same subject matter as the Commonwealth law (see **CAB 70 [55], 71 [61], 87 [99]**). It simply assumed that it was sufficient that the NT WHS Act purported to apply to a set

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63 See *Morris v The Queen* [2005] HCATrans 168 at lines 430-434 (Kirby J), refusing special leave to appeal from *R v Morris* [2004] QCA 408.

64 (2011) 194 FCR 502.

of facts that fell within a subject matter that is exhaustively governed by the Commonwealth law.

Identifying the Commonwealth Law

31. An initial question arises as to which Commonwealth 'laws' are said to be inconsistent with ss 19(2) and 32 of the NT WHS Act. In the Court of Appeal, the parties agreed that the relevant 'laws' comprised the *Air Navigation Act*, the *CAA*, the *CAR*, the *CASR*, several CAOs (made by CASA under *CAA* s 98(4A)-(5)) and several Normative Instruments (made by CASA under *CAA* s 98(5A), (5AA))[65]: **CAB 61 [26]**. Justice Southwood and Riley J expressed their conclusions by reference to the 'civil aviation law' and 'federal law' (at **CAB 69 [52], 83-84 [92]**), which presumably was intended to refer to all of these Acts, Regulations and instruments.

32. The *Air Navigation Act, CAA*, *CAR* and *CASR* are 'laws' within the meaning of s 109.[66] The better view is that the CAOs relied upon by the First Respondent – namely CAOs 82.1, 82.7, 20.9 and 20.16.3 – are also 'laws', noting that they are of general application[67] and are 'legislative instruments' for the purposes of the *Legislation Act 2003* (Cth) (see ss 98(4B) and 98(5AAA) of the *CAA*).[68]

33. By contrast, an Operations Manual[69] is not a 'law', and the content of any particular manual is not capable of evincing any intention on the part of the Commonwealth Parliament. The Court of Appeal accepted this, but nevertheless treated it as a document containing provisions upon which Commonwealth law 'operates to create a norm' and relied upon it in concluding that the Commonwealth laws exhaustively prescribed the law on the embarkation of passengers: **CAB 65 [39], 68 [48], 83 [90]-[91]**. This reasoning was plainly in error. Whilst the content of the Operations Manual might be relevant in a case involving direct inconsistency, it cannot be relevant with respect to indirect inconsistency as that turns on the intention of the Commonwealth Parliament.

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65 No 'normative instruments' were referred to by the Court below, and they may therefore be put to one side.

66 The word 'law' is 'sufficiently general' to apply to regulations made under a statute: *Jemena* (2011) 244 CLR 508 at 523 [38] (The Court). See also *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 592 (Fullagar J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 415-416 [55] (Gleeson CJ and Gaudron J).

67 See *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82-83 (Latham CJ).

68 They are therefore required to be laid before both Houses of Parliament and were subject to disallowance under (at it then was) the *Legislative Instruments Act 2003* (Cth) ss 38 and 42.

69 *CAR* reg 215.

As Barr J observed in the Supreme Court at **CAB 33 [27]**, 'whether the Commonwealth regulatory framework comprehensively and exclusively covers the relevant field cannot be determined by the content of an individual operator's Operations Manual, nor by the consequences of breach by an operator of an effectively self-imposed obligation'.

No indirect inconsistency – Commonwealth Law is not complete or exhaustive statement of the law with respect to workplace health and safety in the context of civil aviation

34. The 'main object' of the *CAA* 'is to establish a regulatory framework for maintaining, enhancing and promoting the *safety of civil aviation*, with particular emphasis on preventing aviation accidents and incidents': s 3A (*emphasis* added). Part II of the *CAA* establishes the CASA, which has the function of conducting the safety regulation of, inter alia, 'civil air operations' in Australia by means including 'developing and promulgating appropriate, clear and concise aviation safety standards'; 'developing effective enforcement strategies to secure compliance with aviation safety standards'; and 'issuing certificates, licences, registrations and permits': s 9(1), see also s 9(2). 'In exercising its powers and performing its functions, CASA must regard the *safety of air navigation* as the most important consideration': s 9A(1) (*emphasis* added). The importance of that consideration is reflected in several provisions of s 98(1), which empowers the Governor-General to make regulations 'in relation to *safety of air navigation*' in certain circumstances (s 98(1)(d)-(f)) (*emphasis* added).

35. Having regard to the above provisions, the subject matter of the Commonwealth Law can be described, at a general level, as the 'safety of air navigation'. But, whether or not the Commonwealth Law provides a complete or exhaustive statement of the law with respect to some matters within that very general subject (such as, for example, matters that impact upon the safe operation of an aircraft in flight), there is no basis to treat the Commonwealth Law as intended to contain a complete or exhaustive statement of the law with regard to workplace health and safety in the civil aviation industry. Indeed, an examination of the context within which the Commonwealth Law was introduced (which includes the existing state of the law at the time the *CAA, CAR, CASR* and certain amending Acts were enacted)[70] reveals that there was no such intention, with subject matter being substantially left to be dealt with by the laws of the States, the Territories and other Commonwealth laws (which operate as part of the national scheme

[70] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

of workplace health and safety laws that is uniform across most jurisdictions and industries). That conclusion does not depend on the *Work Health and Safety Act 2011* (Cth): cf Appellant's submissions at [32]-[36].[71]

Pre-existing State, Territory and Commonwealth laws on workplace health and safety

36. As at 1988 (when the *CAA* and *CAR* commenced), there was in force in the Northern Territory the *Work Health Act 1986* (NT). At that time, it imposed a duty on employers, equivalent to the current s 19 of the NT WHS Act, to 'provide and maintain, so far as is practicable, a working environment at a workplace that is safe and without risk to the health of his workers or any other person working at the workplace': s 29(1). Section 29(2), like the current s 19(3), imposed further, more specific, duties on employers such as to 'provide and maintain plant and systems of work that are, so far as is practicable, safe and without risk to health'. Contravention of s 29 was an offence: s 178. As at 1988, there were equivalent provisions in New South Wales, Victoria, Western Australia and South Australia.[72]

37. These provisions were introduced in response to the *Report of the Committee on Safety and Health at Work 1970-72*, which was the outcome of an inquiry conducted in the United Kingdom and chaired by Lord Robens (**Robens Report**).[73] The Robens Report concluded that the existing UK law (on which Australian workplace health and safety law had been based) was too complex, technical and disparate and should be streamlined into a single 'enabling Act' imposing over-riding, outcome-oriented duties on a range of parties whose conduct could affect workplace health and safety, including employers, the self-employed, designers, manufacturers, importers and employees.[74] Following the Robens Report, the Australian States and Territories reformed their workplace health and safety laws to adopt these recommendations,[75] with New South Wales, Victoria, Western Australia, South Australia and the Northern Territory passing

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71 The Cth WHS Act is limited by s 12 to circumstances where the Commonwealth, a public authority or a non-Commonwealth licensee (a category which does not include the First Respondent) conducts a business or undertaking.

72 *Occupational Health and Safety Act 1983* (NSW) s 15; *Occupational Health and Safety Act 1985* (Vic) s 21; *Occupational Health, Safety and Welfare Act 1984* (WA) s 19; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19.

73 Johnstone, Bluff, and Clayton, *Work Health and Safety Law and Policy* (2012) at 70.

74 Johnstone, Bluff and Clayton, *Work Health and Safety Law and Policy* (2012) at 70-73.

75 Johnstone, Bluff and Clayton, *Work Health and Safety Law and Policy* (2012) at 80.

laws between 1983 to 1986[76] (ie, the years just prior to the enactment of the *CAA/CAR*).

38. It is also relevant to note the existing state of the law as at 1995, when substantial amendments were made to the *CAA*,[77] including amendments to provisions relied upon by the First Respondent (eg inserting new ss 9, 27AB, 28BA, 28BD, 28BE, 28BF, 28BG, 28BH, and amending s 98). By the time those amendments were made, Queensland and the ACT had also adopted workplace health and safety laws in similar terms to the other States,[78] and there was also legislation at Commonwealth level imposing similar workplace health and safety obligations: see the *Occupational Health and Safety Act (Commonwealth Employment) Act 1991* (Cth) (eg, s 16) and the *Occupational Health and Safety (Maritime Industry Act) 1993* (Cth) (eg, s 11). The existing state of the law, as at 1988 and 1995, is important because it reveals that, in circumstances where the legislature did not include in the Commonwealth Law the sort of obligations found in almost uniform terms across the States and Territories (and, in respect of some workplaces, at the Commonwealth level), the Parliament must either have proceeded on the basis that the existing State/Territory laws would continue to apply, or it must have intended to leave a partial vacuum whereby workplaces in the civil aviation industry would lack protections available in other workplaces.

Limited scope of obligations under the Commonwealth Law

39. The fact that the Commonwealth Law imposes various obligations relating to the safety of air navigation does not evince an intention to displace the pre-existing law, for those obligations are of a more limited nature, and they are directed to a different end than those found in workplace health and safety laws of the States and Territories.

40. In particular, the Commonwealth Law does not – in form or in substance – impose an overarching positive obligation on operators to ensure the health and safety of workers and other persons visiting the workplace. The provisions that, on their face, come closest to doing so in fact have a different target. CASA is empowered to authorise the 'flying or operation' of aircraft by issuing AOCs: s 27. Under s 28BA(1), an AOC has

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76 See above n 72. Note the *Work Health Act 1986* (NT) as passed only imposed duties on employers and workers, but was later amended to impose obligations on other persons including designers, manufacturers and suppliers etc by the *Work Health Amendment Act 1995* (NT) which commenced on 26 July 1995.

77 *Civil Aviation Legislation Amendment Act 1995* (Cth) (No 82 of 1995).

78 *Workplace Health and Safety Act 1989* (Qld) s 9; *Occupational Health and Safety Act 1989* (ACT) s 27. The *Workplace Health and Safety Act 1995* (Tas) was assented to on 24 July 1995, which is after the *Civil Aviation Legislation Amendment Act 1995* (Cth) was assented to on 30 June 1995.

effect subject to certain conditions. Contravention of these conditions can result in the suspension or cancellation of the AOC (s 28BA(3). One such condition is imposed by s 28BE(1), which provides:

> The holder of an AOC must at all times take all reasonable steps to ensure that every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence.

41. By reason of that provision, the holder of an AOC who fails to take reasonable steps to ensure that activities covered by an AOC are undertaken with care and diligence becomes exposed to possible suspension or cancellation of his or her AOC, and also to possible prosecution under the general offence provision in s 29. Nevertheless, s 28BE(1) is properly understood as an 'additional, rather than a replacement'[79] obligation for obligations that arise under the general law to exercise a reasonable degree of care and diligence. So much is 'specifically recognized'[80] by s 28BE(5), which provides that s 28BE 'does not affect any duty imposed by, or under, any other law ... of a State or Territory'. If the Commonwealth Law was intended to be a complete or exhaustive statement of the obligations of the holder of an AOC, it is impossible to give meaning to s 28BE(5). That provision assumes that State and Territory laws might (subject to direct inconsistency) continue to impose obligations on the holder of an AOC. The contrary conclusion in *Heli-Aust*[81] is unpersuasive and should not be followed.

42. The Commonwealth Law is not directed to ensuring the health and safety of *workers* or *other persons* visiting the *workplace*, and (unlike the NT WHS Act) does not impose obligations concerning workplace health and safety on the conduct of other parties, such as designers, manufacturers and suppliers.[82] Its silence in that respect points against the Commonwealth Law containing a negative implication that there is to be no State/Territory law addressing those matters.

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79 See *McWaters* (1989) 168 CLR 289 at 298 (The Court).

80 In *Commercial Radio Coffs Harbour*, a provision of the Commonwealth Act 'specifically recognized' the continuing operation of the law of defamation, indicating that the Commonwealth law was 'intended to operate within the setting of other laws': (1986) 161 CLR 41 at 57-58 (Wilson, Deane and Dawson JJ).

81 (2011) 194 FCR 502 at 531 [71] (Moore and Stone JJ), 557 [173]-[174] (Flick J).

82 Regulation 30(2A) and (2BB) of the *CAR* are directed to the integrity and suitability of the product produced or service provided, rather than with workplace health and safety.

43. The narrow focus on imposing safety standards in specific circumstances or on specific persons is also apparent from the provisions of the *CAR* and the CAOs relied upon by the First Respondent. In particular:

43.1. Regulation 92(1)(d) is focused on ensuring the particular *place* from which an aircraft takes off or at which it lands is safe for that particular *purpose*.

43.2. Regulation 215(1) requires an operator to provide an operations manual for the use and guidance of operations personnel of the operator. The operator may be liable for failing to include certain content in the manual, but it is only 'members of the operations personnel of an operator' who are required to comply with the instructions in the manual and may be fined for failing to do so: see reg 215(9).

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43.3. Regulation 235(7) empowers CASA, for the purpose of ensuring the safety of air navigation, to give directions with respect to the method of loading persons and goods (including fuel) on aircraft.[83] CASA has done so in two CAOs relied upon by the First Respondent. CAO 20.9, which largely deals with precautions in refuelling, engine and ground radar operations that are of a technical nature, makes two limited and specific references to the safety of passengers (cll 4.2.1 and 5.3). Similarly, CAO 20.16.3 imposes specific limited requirements regarding the carriage of persons, including the wearing of seat belts, the required number of cabin attendants, smoking and the stowage of loose articles.

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43.4. CAO 82.7,[84] which applies to AOCs authorising aerial work operations and charter operations in balloons, requires an operator to provide sufficient qualified personnel to operate the services proposed by the operator; to appoint a person as Chief Pilot; to provide and maintain facilities and documentation sufficient to enable the operator to conduct services with safety and in compliance with Appendix 1 (cl 2.4). It also provides that the Chief Pilot's responsibilities include 'ensuring compliance with loading procedures specified for each balloon used by the operator' (cl 6.1, Appendix 2 cl 3.2(e)).

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[83] A person must not contravene these CAOs: reg 235(7). Such a contravention by the holder of an AOC would be picked up by s 29(1)(b)(ii) of the *CAA*, read with s 28BA(1)(a) and s 28BD(1)

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[84] CAOs 82.1 and 82.7 are expressed to impose conditions to which AOCs are subject for the purposes of s 28BA(1)(b). A contravention of those conditions by the holder of an AOC would be picked up by the offence provision under s 29(1)(b)(ii), read with s 28BA(1)(b) and/or s 28BD(1).

44. The above analysis is sufficient to resolve this appeal. The Commonwealth Law does not contain an exhaustive statement on the subject matter of workplace health and safety as it relates to civil aviation. Such obligations as it does impose in that general area are supplementary to the operation of the NT WHS Act.

No indirect inconsistency – NT WHS Act is on a different subject matter

45. Even if the subject matter of the Commonwealth Law is described more broadly as the 'safety of air navigation' (or some other related formulation), and even if the Commonwealth Law is held to contain a complete or exhaustive statement of the law on that subject, there is still no indirect inconsistency. That follows because the NT WHS Act is not a law upon the subject matter of the 'safety of air navigation'. Accordingly, to give effect to the NT WHS Act is not inconsistent with a Commonwealth legislative intention to regulate *that subject matter* exhaustively.

46. The objects of the NT WHS Act include providing for a 'balanced and nationally consistent framework to secure the health and safety of workers and workplaces' by, inter alia, 'protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant': s 3(1)(a).

47. Part 2 is titled 'Health and safety duties'.[85] Division 2 of Pt 2, which includes s 19, is titled 'Primary duty of care'. Section 19(2) provides:[86]

> A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

48. Division 3 imposes obligations on managers, designers, manufacturers, importers, suppliers and installers to ensure health and safety insofar as their conduct bears upon the workplace. Division 4 is entitled 'Duty of officers, workers or other persons'. It imposes a duty on an officer of the person conducting the business or undertaking to exercise due diligence to ensure that the person conducting the business or undertaking complies with his/her/its duties and obligations under the NT WHS Act: s 27.

49. Division 5 provides for various offences for breaching duties under the NT WHS Act. Relevantly for present purposes, the First Respondent's breach of s 19(2) gives rise to

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[85] Headings to Parts form part of the Act: see *Interpretation Act* (NT) s 55.

[86] See also s 19(1), (3).

an alleged offence under s 32, the effect of which is that it is an offence to fail to comply with a duty under Divs 2, 3, or 4 where that failure exposes an individual to a risk of death or serious injury or illness. The maximum penalty for an offence committed by a body corporate is $1,500,000.

50. As the above analysis demonstrates, the subject matter of the NT WHS Act is workplace health and safety. It contains a scheme designed to ensure that persons conducting businesses or undertakings take steps to ensure the health and safety of workers and other persons. That scheme applies regardless of whether a business or undertaking involves the operation of aircraft. As such, the subject matters of the Commonwealth Law and the NT WHS Act are 'essentially disparate in character'.[87] As the NT WHS Act is not a law 'upon the same subject matter' that is governed by the Commonwealth Law,[88] it is not inconsistent with a 'negative proposition' that the Commonwealth Law exclusively or completely regulates the 'safety of air navigation'. It follows that, absent direct inconsistency, the NT WHS Act operates concurrently with Commonwealth Law.

51. That conclusion holds even with respect to factual circumstances that attract the operation of both the Commonwealth Law and the NT WHS Act. Being laws with different subject matters, 'each may validly apply to the same set of facts'.[89] To the extent that both laws apply, that involves 'no more than an intermeshing of laws, each legislature having confined itself to those aspects of a particular situation appropriate to its own particular role in the federal compact'.[90]

No direct inconsistency

52. The First Respondent further contends that the Court of Appeal's decision should be upheld on the basis that ss 19, 27 and 32 of the NT WHS Act alter, impair or detract from reg 215 of the *CAR* and CAO 82.7 (read with ss 28BD and 29(1) of the *CAA*) or alternatively reg 92(1)(d) of the *CAR*: **CAB 111-112**. It is not yet clear how this argument will be put, but it is difficult to see how this can be right. Both reg 215 and

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87 *Wardley* (1980) 142 CLR 237 at 250, see also at 248 (Stephen J). See also *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 646 (Gibbs CJ, Wilson and Dawson JJ), 651-652 (Mason, Brennan and Deane JJ).

88 See *Momcilovic* (2011) 245 CLR 1 at 116 [261] (Gummow J).

89 *Gallagher* (1982) 152 CLR 211 at 218 (Gibbs CJ).

90 *Wardley* (1980) 142 CLR 237 at 250 (Stephen J). See also *Gallagher* (1982) 152 CLR 211 at 224 (Mason J).

CAO 82.7 leave a significant discretion to the operator to adopt procedures necessary to ensure the safety of its operations. An operator may fulfil its obligations under s 19(2) of the NT WHS Act, at least in part, *by complying* with reg 215 and CAO 82.7. Regulation 92(1)(d) is directed to ensuring the safety of the place from which aircraft take off or land. Again, an operator may fulfil its obligations under s 19(2) of the NT WHS Act, at least in part, *by complying* with reg 92(1)(d). The provisions are complementary, not conflicting.

***Heli-Aust* was wrongly decided**

53. It follows from the above that *Heli-Aust* was wrongly decided. The Full Federal Court concluded that the Commonwealth laws were intended to exhaustively prescribe the law on the 'safety of civil aviation in flight', and that ss 8(2) and 10(1) of the *Occupational Health and Safety Act 2000* (NSW) entered that field and were accordingly inoperative. As in the present case, the Court paid insufficient regard to the fact that the Commonwealth laws were enacted against the background of State/Territory laws imposing duties of the kind found under ss 8(2) and 10(1), that the Commonwealth laws imposed obligations of a more limited nature and purpose, and that the laws had different subject matters.[91]

PART V ESTIMATED HOURS

54. It is estimated that up to 1 hour will be required to present the Commonwealth's oral argument.

Dated: 22 June 2018

Stephen Donaghue
Solicitor-General of the Commonwealth
T: 02 6141 4145
F: 02 6141 4149
stephen.donaghue@ag.gov.au

Zelie Heger
T: 02 9101 2307
F: 02 9232 7626
heger@elevenwentworth.com

Thomas Wood
T: 02 6141 4118
F: 02 6141 4099
thomas.wood@ag.gov.au

Counsel for the Attorney-General of the Commonwealth (intervening)

[91] *Heli-Aust* (2011) 194 FCR 502 at 530 [67] (Moore and Stone JJ).