IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No D4 of 2018

BETWEEN:
WORK HEALTH AUTHORITY
Appellant

AND:
OUTBACK BALLOONING PTY LTD
First Respondent

DAVID BAMBER
Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

PART II: STATEMENT OF ARGUMENT

A. Introduction

2. The Court below made three fundamental errors (**Appellant's Submissions (AS) [23]-[24], [46]**).

3. There is a substantial difference in penalties for offences under the *Civil Aviation Act 1988* (Cth) (**CAA**) and the *Work Health and Safety (National Uniform Legislation) Act* (NT) (**NT Act**). For a body corporate, s29 of the CAA provides maximum penalties of $315,000 for operating an aircraft recklessly as to endangerment of life and $126,000 otherwise; whereas the ss31, 32, NT Act penalties are $3 million for recklessly exposing a person to risk of death or injury and $1.5 million otherwise.

4. There is no dispute that the identification of inconsistency between Commonwealth and Northern Territory laws proceeds by analogy with the principles, approaches and jurisprudence applicable under s109 of the *Constitution* (**AS [17]**).

B. Subject matter of the Civil Aviation Law[1]

5. As to "indirect inconsistency", the relevant subject matter is that over which the law is, or is said to be, exclusive. Identification of the subject matter of a law is a purposive inquiry for a particular subject matter (**AS [41]-[43]**). A difference in "objects" (ie targets) discloses a difference in purposes and so in subject matters (**Appellant's Reply (AR) [13], cf First Respondent's Submissions (1RS) [95]**). The relevant subject matter here is the safety of air navigation and the question is whether the CAL is the exclusive law on that subject matter (as defined by the First Respondent).

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[1] Comprising the *Air Navigation Act 1920* (Cth), the CAA, the *Civil Aviation Regulations 1988*, the *Civil Aviation Safety Regulations 1998* (Cth), various Civil Aviation Orders and CAAP 215-1.

C. Civil Aviation Law is not intended as a complete statement of the law on everything within or touching on that subject matter

6. To conclude inconsistency, the process of statutory construction must yield the implicit negative proposition that nothing other than what the CAL provides upon the safety of air navigation (and everything incidental thereto) may be the subject of legislation or the law. It does not, for the following reasons (**AS [18]-[19]**).

7. The literal meaning of s28BE(5) captures the duty in s19(2) of the NT Act. There is no warrant to read it down. The decision in *Heli-Aust v Cahill* to the contrary was wrong.

8. The Court below erroneously fashioned "the Chief Pilot duty" from s28BE(1), CAA contrary to the terms of s28BE(5), and from the First Respondent's Operations Manual, which is not a law of the Commonwealth and cannot bear on whether the Parliament intended its CAL to be *the* law on the subject of the safety of air navigation (**AS [47]-[50]**).

9. Contrary to the reasoning in *Heli-Aust v Cahill* followed by the Court below, s28BE(5) demonstrates that the CAA is not the exclusive law in all its scope and operation (**AS [52]**).

10. The nature of the subject matter of the CAL does not require only one law as regards all things touching on the safety of air navigation (**AR [10]**). The CAL is complex because it covers a vast subject matter; it is not detailed in its prescription of safety standards for inflation of hot air balloons or embarkation of passengers (**AS [50]**).

11. The Chicago Convention does not preclude Commonwealth and State/Territory safety standards applying to persons who are passengers embarking on aircraft consistently with and in addition to Commonwealth laws regarding safety of air navigation. It is not shown how the work health and safety laws of the Commonwealth, States and Territories detract from the uniformity required by the Convention. Annexure 19 of the Chicago Convention was not in force at the time of the incident (**AR [8]-[9]**).

12. The *Work Health and Safety Act 2011* (Cth) (**Cth WHS Act**) was ignored by the Court below. Its provisions conflict with the construction of the CAL as the exclusive law regarding the safety of air navigation because it creates obligations of safety in the workplace, including aircraft, and so operates in respect of work occurring in air navigation. Further, it contemplates State and Territory laws in the same terms, including a duty in the terms of s19(2), NT Act (**AS [32]-[36]**).

13. The constructional choice posed is to construe the CAL so that it is not intended as *the* law applying to the subject matter, or to construe it as *the* law and read down the terms of the Cth WHS Act. The Court below must have followed the erroneous approach in *Heli-Aust* (**AS [25]-[31]**). This was wrong because the express terms of the Cth WHS Act cannot yield to the implicit negative proposition in the CAL, comprising both Acts and delegated legislation; there is no scope for implied repeal where the Cth WHS Act is the later law; and the Cth WHS Act's terms are inconsistent with a construction that it and the CAL together are to be *the* law on the subject (**AS [29]-[31], [34]**).

14. To read down the Cth WHS Act to avoid the conflict would effectively read in a new requirement in any work health and safety prosecution by operating only on those workplace risks which affect the performance of aviation safety functions (**AR [6]-[7]**).

15. The preferable construction is that the CAL is not *the* law applying to these particular facts, ie it is not the law on safety of air navigation or it is, but the work health and safety laws are not laws regulating that subject matter.

16. The *Crimes (Aviation) Act 1991* (Cth) also indicates that the CAL is not the law on safety of air navigation. The Queensland Court of Appeal in *R v Morris* correctly took it into account when construing the CAA as not intended to exclude a State law criminalising dangerous flying of an aircraft (**AS [37]-[40]**).

17. The consequences of the opposite construction will not necessarily result in standards for the safety of crew and passengers on aircraft changing at the borders (**cf 1RS [28], [66]**).

18. The NT Act does not regulate the safety of air navigation; it regulates health and safety risks to persons arising from work or workplaces. It does not regulate the exclusive subject matter of the safety of air navigation; it regulates health and safety risks to persons from work or workplaces (**AS [43]-[45]**).

D. Direct inconsistency

Notice of contention ground 1

19. The duty under CAR 215 is not the only duty on an operator under the CAL. The duties under CAR 215 and s19(2) are complimentary. Further, the duty in s19(2), to ensure "as far as reasonably practicable" would take account of any loss of control by the operator to the Pilot in Command of what occurs in respect of a flight. In any event, when this incident occurred, the "flight" had not commenced. "Flight" (defined in s3, CAA) commences for a balloon when it becomes detached from the surface of the earth. That had not occurred when Ms Bernoth approached the basket. The Pilot's responsibility under CAR 224 only extended to persons carried on the aircraft and Ms Bernoth was not on it. In any event, CAR 224 does not deny any ongoing responsibility of the operator (**AS [56]-[57], AR [14]**).

Notice of contention ground 2

20. There is no foundation for the assertion that to erect a barrier on the land to separate passengers and crew from the inflation fan in proximity to the balloon whilst it is being inflated and might take off would render the take off place unsuitable within CAR 92(1)(d) (**AR [15]**).

E. Effect of inconsistency between Territory and Commonwealth laws

21. Whether s19(2) of the NT Act is simply inoperative as opposed to wholly invalid since its enactment (**cf Cth Submissions [9]**) has not been the subject of argument and should not be determined on this appeal.

Dated: 14 August 2018

Name: Sonia Brownhill SC