IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D4 of 2018

ON APPEAL FROM THE COURT OF APPEAL
OF THE NORTHERN TERRITORY

BETWEEN:

WORK HEALTH AUTHORITY
Appellant

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AND:

OUTBACK BALLOONING PTY LTD
First Respondent

DAVID BAMBER
Second Respondent

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APPELLANT'S SUBMISSIONS

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Part I:

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II:

2. The single issue on appeal stated at its most general is whether or not the complaint[1] laid by the appellant against the first respondent discloses an offence. The Court of Appeal of the Northern Territory (**Court of Appeal**) found that it did not because the workplace duty imposed under s 19(2) of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (**NT WHS Act**) was inoperative to the extent relied on in support of the charge by reason of its inconsistency with the Commonwealth's civil aviation law[2] (**Civil Aviation Law**).[3]

3. The appeal and the first respondent's notice of contention raise three questions:
   (1) Does the Civil Aviation Law manifest by implication an intention to regulate, to the exclusion of all other laws, with the subject of civil aviation safety?
   (2) If the answer to question (1) is "yes", does the duty under s 19(2) of the NT WHS Act as relied on in the charge purport to regulate the subject of civil aviation safety?
   (3) Alternatively, do ss 19(2), 27 and 32 of the NT WHS Act, in their application to the first respondent as particularised in the charge, directly vary, detract from or impair the operation of either ss 28BD and 29(1) of the CAA together with CAR reg 215 and CAO 82.7, or alternatively CAR reg 92(1)(d)?

4. Each of those questions should be answered in the negative.

5. More fundamentally, this appeal concerns the principles which should govern the task of statutory construction presented by the first of the three questions above. Specifically, is it necessary, when construing a federal law said to manifest an intention to deal comprehensively and exclusively with a subject matter, to have

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[1] The complaint appears from pg 33 of the Appellant's Book of Further Materials (**ABFM 33**).

[2] Comprising: *Air Navigation Act 1920* (Cth), *Civil Aviation Act 1988* (Cth) (**CAA**), the *Civil Aviation Regulations 1988* (Cth) (**CAR**), the *Civil Aviation Safety Regulations 1998* (Cth) (**CASR**) and various normative instruments issued under those laws being instruments issued by the Civil Aviation Safety Authority (**CASA**) under s 98(5A) and falling within the terms of s 98(5AA) of the CAA.

[3] *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1 (**Reasons**) at [55], [59] **Core Appeal Book (CAB) 70-71**.

regard to the body of laws enacted by the Commonwealth Parliament which would be affected by such a construction of the law? This question should be answered affirmatively. However, the Court of Appeal failed to do so, and that failure renders the construction of the Civil Aviation Law adopted below untenable.

Part III:

6. The appellant and first respondent have served notices in compliance with s 78B of the *Judiciary Act 1903* (Cth).[4]

Part IV:

7. The judgment of the Local Court is unreported.[5] The judgment of the Supreme Court of the Northern Territory is reported as *Work Health Authority v Outback Ballooning Pty Ltd* (2017) 318 FLR 294. The judgment of the Court of Appeal is reported as *Outback Ballooning Pty Ltd v Work Health Authority* (2017) 326 FLR 1.

Part V:

8. Unless otherwise indicated, the following narrative statement of facts is taken from the precis of allegations[6] agreed and admitted for the purpose of argument on the validity of the complaint.[7]
9. The first respondent operates a commercial passenger ballooning business in Alice Springs and is a person conducting a business or undertaking within the meaning of s 5 of the NT WHS Act and subject to the primary duty of care under s 19(2) of that Act. The first respondent held an Air Operator's Certificate (**AOC**) issued by CASA under CAA s 27.[8] The director of the first respondent is the holder of a Commercial Balloon Pilot's License issued by CASA.
10. Early on 13 July 2013 a bus operated by the first respondent collected passengers from their hotels and drove them to the balloon launch site, known as River Track 1, located approximately 6.5 km from the Alice Springs airport.

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[4] **CAB 107** and **CAB 113**, respectively.

[5] **CAB 1**.

[6] **ABFM 2**.

[7] Transcript of proceedings in the Local Court, 22 September 2015, p 5.

[8] **ABFM 15**.

11. The passengers exited the bus at River Track 1 and the balloon and basket were unloaded. The passengers were given a short briefing.

12. The basket was positioned on its side with the opening facing the balloon laid out on the ground for inflation. Inflation of the balloon was assisted by a fan driven by a 13hp Honda motor. The fan was not part of the balloon. Once the balloon was sufficiently inflated to support its own weight the pilot instructed passengers to board the basket which was still on its side. Passengers were separated into two groups to board the basket from both sides.

13. Stephanie Bernoth was directed to board the basket on the side closest to the fan. As she made her way past the fan her scarf was sucked into the fan and became entangled in the fan blades. Ms Bernoth was dragged head first towards the guard on the fan. The fan was turned off and resuscitation attempted. Stephanie Bernoth was taken by ambulance to hospital but later died from her injuries.

14. In addition to those agreed findings of fact, Southwood J drew several inferences:[9] (1) that boarding was supervised by the Chief Pilot; (2) that boarding on both sides of the basket was done to achieve a balanced load; (3) that a balanced load was necessary for safety in flight; and (4) that the death of Ms Bernoth was caused by the direction she received to board the basket from the side where the inflation fan was located and by the fact that she was wearing a scarf.

15. As to those inferences, they were drawn for the first time in the Court of Appeal in circumstances where: (1) there had been no issue joined between the parties about those matters in that Court or below; (2) the Court had not invited submissions from the parties about them;[10] and (3) no regard was paid to the nature of the agreed facts as a statement of the allegations made by the prosecutor for the purpose of determination of the question of law rather than as a complete factual matrix.[11] The first inference mistakes the pilot for the Chief Pilot. There was no evidence to found this inference.[12] The second and third inference do not take matters anywhere unless

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[9] Reasons at [21] [**CAB 59**].

[10] *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [146] per Hedyon J, citing *Thomas v Mowbray* (2007) 233 CLR 307 at [618].

[11] Transcript of proceedings in the Local Court, 22 September 2015, p 5. Cf *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at [20]-[21], [24], [32]-[34]; *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 (***Heli-Aust***) at [3], [5].

[12] In oral submissions in the Court of Appeal, Senior Counsel for Outback Ballooning Pty Ltd referred to the pilot as the Chief Pilot: Transcript of proceedings in the Court of Appeal, 30 August 2017, p 3. That

the logical fallacy is committed of concluding that the boarding of passengers on both sides of the basket, and specifically, by bringing passengers in close proximity to the fan, was necessary for a balanced load in flight. The last and most concerning inference effectively relegated part of the charge to irrelevancy[13] based on the appellate court's reading of the agreed facts and without hearing any evidence, including expert evidence. The inferences drawn by the Court of Appeal do not advance the task of statutory construction, should not have been drawn, and ought now be disregarded.

Part VI:

Principles and concepts

16. *Inconsistency between laws*: The Civil Aviation Law is of general application throughout Australia.[14] It is enacted by the Commonwealth Parliament in the exercise of power conferred by s 51 of the *Constitution.*[15] The NT WHS Act is a law of the Northern Territory Legislative Assembly which body derives its legislative power from s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) enacted under s 122 of the *Constitution.*

17. In the event of irreconcilable conflict between the two laws, and bearing in mind s 59 of the *Interpretation Act* (NT), the subordinate status of the Legislative Assembly determines that the Civil Aviation Law prevails and the NT WHS Act is inoperative to the extent of any inconsistency.[16] The result is analogous with the effect prescribed by s 109 of the *Constitution* in respect of inconsistency between a law of the Commonwealth and a law of a State.[17]

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submission had not been put below, was not founded in the evidence, and is contrary to our instructions that another person, not present on the day, was the Chief Pilot.

[13] See particulars 5(a), (c), (e), (f) and 6(a), (b), (c) of the complaint [**ABFM 34**].

[14] CAA ss 3 (definition of "Australian territory"), 5(1), 6, 7, 9(1); *Air Navigation Act 1920* (Cth) s 3 (definition of "Australian territory" which term appears throughout that Act); *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 (***Airlines No 2***) at 85-87 per Barwick CJ, 165 per Owen J.

[15] *Airlines (No 2)* at 77-79, 85 per Barwick CJ; *Ansett Transport Industries Ltd v Morris* (1986) 18 FCR 527 at 561.

[16] *Northern Territory v GPAO* (1999) 196 CLR 533 at 576, 579-580, 581-2 per Gleeson CJ and Gummow J, 630 per Kirby J; *R v Kearney; ex parte Japanangka* (1984) 158 CLR 395 at 418 per Brennan J; *University of Wollongong* (1984) 158 CLR 447 at 464 per Mason J.

[17] As to which see: *Western Australia v Commonwealth* (1995) 183 CLR 373 at 465.

18. Inconsistency between laws may arise in several ways.[18] First, where conflicting duties are imposed. Secondly, where the paramount law deliberately permits conduct which the subordinate law prohibits[19] (or vice versa[20]). Thirdly, where the paramount law is intended to be a complete statement of the law governing a particular subject, relation or thing and the subordinate law purports to regulate that very thing.[21] The inquiry to determine whether the two laws are inconsistent is fundamentally the same in each case. The starting point is the proper construction of the two laws.[22] The question is whether the subordinate law, if operative, would alter, impair or detract from the paramount law,[23] that is, whether there is a real conflict between the two laws on their proper constructions.[24] In the third category of case, the inquiry is whether or not the subordinate law conflicts with an implicit negative proposition that nothing other than what the paramount law provides upon a particular subject matter may be the subject of legislation or the common law.[25] Although the first and second category are sometimes called "direct inconsistency" and the third category "indirect inconsistency", these labels are not always used consistently[26] and add little to the discourse.[27]

19. *Imputed intention to exclude other laws*: Where no express statement of intention that the paramount law operates to the exclusion of all other laws appears in the text of the law, ascertaining the existence of an imputed intention must proceed in accordance with the ordinary rules and principles of statutory construction giving

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[18] *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [240] per Gummow J (Bell J agreeing at [660]).

[19] See, eg, *Dickson v The Queen* (2010) 241 CLR 491 at [22].

[20] *Momcilovic* at [240] per Gummow J (Bell J agreeing).

[21] See, eg, *Viskauskas v Niland* (1983) 153 CLR 280; *Commonwealth v ACT* (2013) 250 CLR 441 (***Marriage Equality Case***) at [59].

[22] *Momcilovic* at [242] per Gummow J (Bell J agreeing).

[23] *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 259-260 per Mason J, 280 per Aickin J; *Momcilovic* at [242]-[245] per Gummow J (Bell J agreeing), [240] per Hayne J; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 56 per Wilson, Deane and Dawson JJ.

[24] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [42].

[25] *Momcilovic* at [244] per Gummow J (Bell J agreeing); *Marriage Equality Case* at [59]. See also *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J; *Victoria v Commonwealth* (1937) 58 CLR 618 (***The Kakariki***) at 630 per Dixon J.

[26] *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 259-260 per Mason J. Compare *Heli-Aust* at [83] per Moore and Stone JJ with [161] per Flick J.

[27] *Momcilovic* at [318], [339]-[340] per Hayne J.

priority to the language used by Parliament interpreted in accordance with its purpose and in its full context.[28]

20. This requires that the interpreting court engage in a process of selection between the available constructions of the law.[29] At that moment of "constructional choice",[30] the full context of the law, including at least the existing state of the law enacted by the Parliament and the effect of the available constructional choices on that law, must be considered.[31] Lord Wilberforce explained the choices confronting the interpreting court in such a case as follows:[32]

> The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of the pre-existing legislation, so that each may operate within its respective field?

21. There is a strong presumption that, absent express statement or necessary implication, a legislature does not intend to contradict itself.[33] That presumption manifests in the proposition that implied repeal of other laws of the same polity will rarely present the most favourable constructional choice.[34] This is an aspect of the presumption of coherence or the principle that wherever possible laws of the same legislature should be construed harmoniously and so as to operate as an integrated whole.[35]

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[28] *Akiba v Commonwealth* (2013) 250 CLR 209 at [30]-[31] per French CJ and Crennan J; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Zheng v Cai* (2009) 239 CLR 446 at [28].

[29] *Acts Interpretation Act 1901* (Cth) s 15AA; *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405 (***SZTAL***) at [38] per Gageler J.

[30] *Momcilovic* at [50] per French CJ.

[31] *Brown v Tasmania* (2017) 349 ALR 398 at [379] per Gordon J; *SZTAL* at [38]-[39] per Gageler J; *Akiba* at [30]-[31]; *Momcilivic* at [315] per Hayne (French CJ agreeing at [111]); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321 per Mason and Wilson JJ.

[32] *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 533 per Lord Wilberforce. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [2] per Gleeson CJ.

[33] *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 275-276 per Fullagar J; *Shergold v Tanner* (2002) 209 CLR 126.

[34] *Goodwin v Phillips* (1908) 7 CLR 1 at 10 per Barton J; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [48] per Gummow and Hayne JJ.

[35] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (2014, 8th ed) at [3.39]; R Sullivan, *Sullivan and Driedger on the Construction of Statutes* (2002 4th ed) at 262; M Leeming, *Resolving Conflicts of Laws* (2011) at [3.2];

22. Further, the task of weighing constructional choices in their legislative context is not static or fixed in time. "The meaning of a statutory text is ... informed, and reinformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists".[36] So, where the body of statute law changes over time, so too does the context in which the constructional choices must be (re)evaluated.[37] This is the inevitable implication to be drawn from the principle of long-standing that "subsequent legislation may fix the proper interpretation which is to be put upon the earlier",[38] which principle has been applied many times since.[39]

Grounds 1 and 2: The approach in *Heli-Aust* should not have been followed

23. The decision of the Court of Appeal applied uncritically and without comment the flawed constructional premise adopted in *Heli-Aust Pty Ltd v Cahill* (2011) 194 FCR 502 (***Heli-Aust***) (see paragraphs 25 to 40 below) that the task of interpreting the Civil Aviation Law could be approached without regard to the existing state of the Commonwealth law affected by the construction adopted.[40] This led the Court into error, arriving at the same (as *Heli-Aust*) erroneous construction of the Civil Aviation Law as a comprehensive and exclusive statement of law governing the safety of civil aviation.

24. Likewise, the Court of Appeal disregarded uncritically and without comment the principle in *R v Winneke; ex parte Gallagher* (see paragraphs 41 to 43 below) and approached the question whether the NT WHS Act entered the field of aviation

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Commissioner of Stamp Duties v Permanent Trustee Co Ltd (1987) 9 NSWLR 719 at 722D-E per Kirby P; *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [98] per Gageler J.

[36] S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37(2) *Mon LR* 1, 1-2.

[37] *Ormond Investment Co v Betts* [1928] AC 143 at 164 per Lord Atkinson; *Deputy Commissioner of Taxation (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626 per Dixon, Evatt and McTiernan JJ.

[38] *Cape Brandy Syndicate v Inland Revenue Commissioners* (1921) 2 KB 403 at 414 per Sterndale LJ.

[39] *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626 per Dixon, Evatt and McTiernan JJ and the authorities cited therein.

[40] Reasons [9], [58] per Southwood J (Blokland J agreeing), [77]-[79], [97]-[98] per Riley J. The reasons of the Court of Appeal do not mention either the Cth WHS Act or the *Crimes (Aviation) Act 1991*, demonstrating apparent acceptance of the first respondent's submissions that those laws were either capable of reconciling with the Civil Aviation Law or otherwise irrelevant as laws of the same polity: Transcript of proceedings in the Court of Appeal, 31 August 2017, p 98-99.

safety by reference to factual commonality and without regard for the different purpose for which the duty under s 19(2) was imposed.[41]

25. Heli-Aust *failed to construe the Civil Aviation Law in its context:* In *Heli-Aust*, the Full Court of the Federal Court of Australia found that the Civil Aviation Law was "intended to regulate the safety of civil aviation in Australia comprehensively and [is] not intended to operate in conjunction with State legislative schemes directed to the same end, namely the safety of air navigation".[42] The Court reasoned that the history of Commonwealth regulation and its connection with international obligations, the main objects of the CAA, and the detailed provisions of the CARs and CASRs demonstrate that the Civil Aviation Law is a comprehensive and exclusive body of law regulating the safety of civil aviation.

26. That construction of the Civil Aviation Law was reached without sufficient regard to the principles of construction laid out above, and specifically without consideration of the then existing state of Commonwealth legislation regulating matters in aviation safety and the effect of the constructional choices presented by the case on that body of law. The Full Court erred in doing so. That error manifested in two ways: (1) in the Full Court's dismissal of the relevance of the *Occupational Health and Safety Act 1991* (Cth) (**OHSA**); and (2) in the Full Court's failure to follow the earlier decision of the Queensland Court of Appeal in *R v Morris* [2004] QCA 408 (***Morris***).

27. *Commonwealth workplace safety law*: The OHSA was in force at the time of the incident giving rise to the proceedings in *Heli-Aust*. It was an Act to promote the occupational health and safety of persons employed by the Commonwealth, Commonwealth authorities and certain licensed corporations, and for related purposes.[43] Relevantly, the Act created and imposed occupational health and safety duties on employers to take all reasonably practicable steps to protect the health and safety of employees[44] and third parties[45] in Commonwealth workplaces.[46] The

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[41] Reasons, [55] per Southwood J (Blokland J agreeing), [99] per Riley J.

[42] At [67] per Moore and Stone JJ. See also [164] per Flick J.

[43] OHSA, long title.

[44] OHSA s 16(1).

[45] OHSA s 17.

[46] OHSA s 5 (definition of "workplace").

definition of "workplace" included work premises comprising "aircraft".[47] The duties created by the Act were enforceable by criminal and civil proceedings.[48]

28. The construction of the Civil Aviation Law preferred in *Heli-Aust* brought the Civil Aviation Law into apparent conflict with the OHSA. Despite this, the Full Court found that the terms of that Act were "irrelevant" to the task before it.[49] The plurality judgment explained that because the question of the interaction between these two federal laws was governed by different principles to those which govern inconsistency within the meaning of s 109 of the *Constitution*, it was not necessary to consider the interaction to resolve the matter before the Court. This was correct in the sense that the interaction between the two Commonwealth laws was not the subject of the legal dispute between the parties. However, the task of properly construing the Civil Aviation Law required the Court to consider the meaning and effect of the Civil Aviation Law in its statutory context including the OHSA. The effect of the available constructional choices on that law was a necessary component of the task of properly engaging in the interpretive exercise.

29. The plurality reasons posited (at [82]) without endorsing three alternative resolutions of the apparent conflict. First,[50] that the maxim *generalia specialibus non derogant* might resolve the conflict with the general workplace safety regulation yielding to the more specific aviation safety regulation. There are a number of problems with that resolution. In the first place, the intention for the workplace safety law to operate with respect to aircraft and therefore within aviation safety is derived from the express language of the statute. That language cannot be read down to mean something other than aircraft. Whereas what was implicit in the Civil Aviation Law could be read to coincide with the express language. There is considerable force in the observation of Windeyer J in *Cobiac v Liddy* (1969) 119 CLR 257 at 268 that the maxim explains the result of textual analysis but does not justify a construction not supported by such analysis. It is doubtful that the maxim has any application where the specific or special law is said to be an entire statutory scheme rather than a

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[47] OHSA s 5 (definition of "premise" and "workplace").

[48] OHSA Sch 2.

[49] At [82] per Moore and Stone JJ. Flick J did not mention this issue in his separate reasons.

[50] By reference to Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at [4.32]. Cf *Goodwin v Phillips* (1908) 7 CLR 1 at 14 per O'Connor J.

particular and limited power, duty or liberty. Furthermore, the intention to deal exclusively with the subject of aviation safety is derived, not from the CAA or the *Air Navigation Act*, but from the terms and detail of the regulations enacted under the CAA.[51] The ordinary principle which applies to a conflict arising between a regulation and an Act of the same legislature is that the regulation must yield to the terms of the Act.[52]

30. Secondly,[53] to the extent that the laws can't be reconciled, the later (considering substantive amendments made in 1995[54]) Civil Aviation Law must be taken to have impliedly repealed the earlier OHSA. This again suffers from the flaw that it prioritises the force of a regulation over an Act. It also fails to recognise the strong presumption against that result, implied repeal being a rule of last resort where no alternative constructional choices are available.

31. Thirdly,[55] the two Commonwealth laws, the Civil Aviation Land and the OHSA, comprehensively and exclusively regulated aviation safety to the exclusion of State law. If that possibility were to be seriously considered, the terms of the OHSA could not be said to be irrelevant to the inquiry as they formed part of the scheme from which the intention to exclude other laws was imputed.

32. *The Court of Appeal failed to construe the Civil Aviation Law in its context:* It is not now necessary to explore further the effect of the OHSA because, on 1 January 2012, it was repealed and replaced by the *Work Health and Safety Act 2011* (Cth) (**Cth WHS Act**). The Cth WHS Act was in force at the time of Ms Bernoth's death. The intention of the Civil Aviation Law must necessarily be re-examined on that date in the context of the state of the law then existing.[56]

33. The Cth WHS Act was enacted to implement the Model Work Health and Safety Bill within the Commonwealth jurisdiction to form part of a system of nationally

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[51] *Heli-Aust* at [145]-[159] per Flick J.

[52] *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588.

[53] By reference to Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at [7.13] and following.

[54] *Heli-Aust* at [51].

[55] At [82].

[56] Acceptance of that argument is implicit in the discussion of the evolution of Commonwealth regulation of aviation safety appearing in *Heli-Aust* at [34]-[52].

harmonised occupational health and safety laws.[57] The terms and structure of the Cth WHS Act reflect model legislation enacted in all jurisdictions except Victoria and Western Australia. Section 19(2) of the Cth WHS Act mirrors the primary duty of care in the same section of the NT WHS Act, and applies to the Commonwealth and public authorities conducting a business or undertaking, and to workers carrying out work for such a business or undertaking.[58] "Workplace" is defined to mean any place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work, where "place" includes an aircraft.[59] The Cth WHS Act contains some specific exceptions to its operation,[60] demonstrating that the legislature turned its mind to the interaction between the duties imposed under the Cth WHS Act and other regulatory schemes.

34. The language of the Cth WHS Act does not permit it be construed otherwise than as having application, in its terms, to aircraft. As the later enactment in time, it cannot be impliedly repealed by the CAA. Its passage by the Parliament must bear upon the then existing statutory scheme for the regulation of aviation safety.

35. The construction of the Civil Aviation Law as manifesting an intention to operate comprehensively and exclusively for the regulation of aviation safety is negatived by the express statement of intention in s 3(1)(h) of the Cth WHS Act as an Act having:

> [T]he main object ... to provide for a nationally consistent framework to secure the health and safety of workers and workplaces by ... maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.

36. That object is unachievable by the Cth WHS Act alone and without concurrent operation by the State and Territory counterpart legislation because the Cth WHS Act is confined to particular public entities.[61] The Explanatory Memorandum confirms that the object is to be achieved by the enactment of mirror workplace safety laws in all jurisdictions. On no tenable construction of the Cth WHS Act is

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[57] House of Representatives, Explanatory Memorandum to the Work Health and Safety Bill 2011 (Cth), p 1; Cth WHS Act s3(1).

[58] Cth WHS Act s 12(1).

[59] Cth WHS Act s 8.

[60] Cth WHS Act s 12A.

[61] Cth WHS Act s 12(1).

the interpretation that would best achieve the purpose or object of the Act[62] an interpretation which excludes the operation of the mirror State and Territory workplace safety laws from the subject matter regulated by the Cth WHS Act.

37. *Morris*: In *Morris*, the Court of Appeal of the Supreme Court of Queensland rejected a submission that particular provisions in the CAA and CARs, which prohibited reckless operation of aircraft and flying below certain altitudes, contained an implicit negative proposition that they were intended to regulate the safe operation of aircraft comprehensively and exclusively and therefore excluded the concurrent operation of an offence of recklessly operating a vehicle (aircraft) under Queensland law.[63] In doing so, the Court considered and rejected the proposition that any such implication could be derived from the terms and scope of the CAA and CAR.[64] The Court recognised the significance of the broader statutory context in which the constructional question was posed: "if [the regulation excluded other laws] it would displace the operation within that space of all of the other and more general provisions of the Criminal Code and otherwise that affect to regulate human conduct by penalising as criminal acts and omissions in this State."[65] The Court referred to the *Crimes (Aviation) Act 1991* (Cth). That Act gives effect to various international instruments the text of which appears in four schedules to it. These are different international instruments to those to which the Civil Aviation Law gives effect.[66] The *Crimes (Aviation) Act* creates a range of offences relating to the safe operation of aircraft[67] and air navigation. These include offences of prejudicing the safe operation of aircraft,[68] endangering the safety of aircraft,[69] endangering the safety of

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[62] *Acts Interpretation Act 1901* (Cth) s 15AA.

[63] At [4] per McPherson JA, [9] per Williams JA.

[64] At [7] per McPherson JA, [37] per Williams JA.

[65] At [37] per Williams JA.

[66] *Heli-Aust* at [34], [39]-[40].

[67] "Aircraft" has the same meaning under the *Crimes (Aviation) Act* as under the CAA: The definition of "Australia aircraft" in s 3 refers to "an aircraft registered, or required to be registered, under the Civil Aviation Regulations". The term "Civil Aviation Regulations" is defined in that same section to include, relevantly, the CASRs. The requirement to register aircraft is at CASR r 47.015 which definition employs the term "aircraft" as defined in s 3 of the CAA.

[68] *Crimes Aviation Act 1991* (Cth) ss 19, 20. As to the scope of these provisions see the definition of "Division 3 aircraft" and "prescribed flight" in s 3.

[69] *Crimes Aviation Act 1991* (Cth) ss 22, 22A. As to the scope of these provisions see the definition of "Division 3 aircraft" and "prescribed flight" in s 3.

aircraft in flight,[70] and offences relating to the possession of dangerous goods,[71] the use of aerodromes and air navigation facilities.[72]

38. The construction of the Civil Aviation Law preferred in *Heli-Aust* brought the Civil Aviation Law into apparent conflict with the *Crimes (Aviation) Act*, but the Full Court did not consider this when dismissing the reasoning in *Morris*.[73] As with the Cth WHS Act, the Act could not be read as if it did not apply to aircraft and air navigation, and repeal of the entire Act by implication was similarly unavailable. This left, on the Full Court's suggested resolutions of the OHSA, the prospect that the *Crimes (Aviation) Act* forms part of the scheme for the regulation of the safety of civil aviation from which the Full Court inferred an intention to operate comprehensively and exclusively.

39. The Full Court in *Heli-Aust* was wrong to do so when s 50(1) of the *Crimes (Aviation) Act* provides that "[s]ubject to this section, this Act does not exclude or limit the operation of any other law of the Commonwealth, or of a State or Territory", and s 50(2) and (3) provide, in a manner not dissimilar in effect to s 4C of the *Crimes Act 1914* (Cth), for the harmonious coexistence of Commonwealth and State and Territory offences, by prescribing rules for when an offender may be convicted of each.[74] Less directly, conduct made an offence under the laws of the Australian Capital Territory (operable in Jervis Bay) is picked up by ss 14 and 15 as a factum upon which those sections operate to create Commonwealth offences.

40. It must follow that the *Crimes (Aviation) Act* is incompatible with an imputed intention in the Civil Aviation Law to exclude State and Territory laws generally or State and Territory offences specifically from its civil aviation safety subject matter. It is clear from the terms of the international instruments to which the *Crimes (Aviation) Act* gives effect that its subject matter includes the safety of civil aviation.[75]

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[70] *Crimes Aviation Act 1991* (Cth) s 25.

[71] *Crimes Aviation Act 1991* (Cth) s 23, 23A.

[72] *Crimes Aviation Act 1991* (Cth) div 5.

[73] *Heli-Aust* at [79]-[80].

[74] *Momcilovic* at [104] per French CJ, [252]-[255] per Gummow J (Bell J agreeing), [642] per Crennan and Kiefel JJ.

[75] Convention for the Suppression of Unlawful Seizure of Aircraft, preamble (in *Crimes Aviation Act 1991* (Cth) Sch 1); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (in

41. Heli-Aust *failed to recognise the purposive dimension of subject matter*: There is a further aspect of the decision in *Morris* which goes towards answering the second question in paragraph 3 above (to the extent it arises). The Court in *Morris* recognised that offence provisions not directed specifically to aviation safety (but capable of application to the use of aircraft) and the aviation safety provisions of the Civil Aviation Law do not necessarily deal with the same subject matter.[76] Even more clearly, the defendant's application for special leave to appeal from the decision in *Morris* on the inconsistency argument was refused on this basis, Kirby J observing that "the two laws, federal and State, can operate harmoniously, in a case such as the present, for their respective purposes. The federal law operates for the ordinary regulation of civil aviation; the State law for the use of an aeroplane dangerously and criminally".[77]

42. This is the principle applied in *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211. Holding that a Commonwealth law regulating the conduct of witnesses before a Royal Commission was not inconsistent with a State law regulating the same conduct before a State commission of inquiry where the conduct occurred in the course of a joint commission, Gibbs CJ explained that the two laws dealt with different subjects although in their application to proceedings before the joint commission they regulated the same conduct, namely refusing to answer a question.[78] The principle was recognised in *Viskauskas v Niland* (1983) 153 CLR 280[79] and *Momcilivic*.[80] The fundamental recognition that sits behind the principle is that the subject matter of a law is not two dimensional or reducible to the nature of the conduct regulated.[81] The purpose for which regulation operates similarly informs the subject matter of a law. In the modern federal context the same conduct may be regulated by a number of

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Crimes Aviation Act 1991 (Cth) Sch 2); Convention on Offences and Certain other Acts committed on Board Aircraft, art 1 (in *Crimes Aviation Act 1991* (Cth) Sch 3).

[76] At [7] per McPherson JA, [36]-[40] per Williams JA.

[77] *Morris v The Queen* [2005] HCATrans 168 (21 March 2005).

[78] 152 CLR 211 at 218-219. See also 220-221 per Mason J, 232-233 per Wilson J.

[79] 152 CLR 211 at 294-295.

[80] *Momcilivic* at [336], [338] per Hayne referring to the discussion of principle in *Ex parte McLean* (1930) 43 CLR 472 at 485-486 per Dixon J.

[81] *The Kakariki* at 634 per Evatt J.

different compatible laws existing for different purposes and each operating concurrently within their respective though intersecting spheres of operation.[82]

43. *The NT WHS Act did not regulate aviation safety*: The characterisation by the Full Court in *Heli-Aust* of the State workplace safety law as one regulating the unsafe operation of the helicopter and therefore falling within the subject matter of aviation safety[83] failed to distinguish the different objective and purpose of the workplace safety law, namely to provide for the safety of workers and workplaces.

44. The Court of Appeal applied the same constricted understanding of subject matter, focused solely on the concurrent operation of the laws to a particular sequence of events[84] and without regard for the purpose of the duty in s 19(2) of the NT WHS Act:[85]

> to secure the health and safety of workers and workplaces by ... protecting workers and other persons against harm ... [having] regard ... to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.

45. Properly and purposively construed, the NT WHS Act is not a law for the regulation of aviation safety. On this alternative analysis of the integration of the Civil Aviation Law and workplace safety laws, including the NT WHS Act, they are laws on different subject matters and therefore the latter does not interfere with the exclusive field of operation of the former.

Ground 3: The "Chief Pilot duty" did not exclude the NT WHS Act

46. In addition to the errors carried over from following the approach in *Heli-Aust*, the plurality reasons of the Court of Appeal justifying an extension of the field of exclusive operation of the Civil Aviation Law to the circumstances before it introduced a further and compounding error by having regard to two matters which could not be relevant to that inquiry: (1) the content of the first respondent's operations manual; and (2) the content of the duty under s 28BE(1) of the CAA.

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[82] In the aviation context see: *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207 at [1], [26]-[27], [57], [88], [94], and [113](b) per Flick, Reeves and Griffiths JJ; *Cook v Modern Mustering Pty Ltd* (2015) 304 FLR 176 at [55]-[56] per Kelly J.

[83] *Heli-Aust* at [81] per Moore and Stone JJ, [165] per Flick J.

[84] Reasons, [55] per Southwood J (Blokland J agreeing), [99] per Riley J.

[85] NT WHS Act s 3.

47. The formulation of obligations and duties (at Reasons [48]) is critical to the plurality's conclusion. Their Honours found that the Chief Pilot[86] was under duties "with reasonable care and diligence, to take all reasonable steps to point out the dangers of the inflation fan ... [and] supervise the area around the inflation fan." Those duties informed the subsequent findings that failure to carry out (Reasons [50]) or reckless performance (Reasons [51]) of the duties would expose the Chief Pilot to criminal liability. "It also follows", according to the plurality reasons (Reasons [52]), that the field of operation of the Civil Aviation Law extends to the loading of the passengers onto the balloon. Further, in concluding that the duty imposed under s 19(2) of the NT WHS Act, as pleaded in the complaint, entered the field of exclusive operation of the Civil Aviation Law, the plurality reasons returned to those duties noting that the same conduct would result in a breach of both the primary duty under s 19(2) of the NT WHS Act and those duties.[87]

48. The only possible source in the Civil Aviation Law of a duty to "take all reasonable steps" with "reasonable care and diligence" is CAA s 28BE(1). The only possible source of an obligation "to point out the dangers of the inflation fan to passengers" or "supervise the area around the inflation fan" is the first respondent's operations manual, an extract of which was in evidence and contained directions of that nature.[88] Reliance on a duty framed by reference to the contents of the operations manual and s 28BE(1) was wrong for several reasons.

49. First, it made the field of exclusive operation of the Civil Aviation Law contingent on and referable to the contents of the first respondent's own operations manual, a document it prepared as required by CAR 215. The difficulties with doing so are many and obvious. The operations manual is dated 1 September 2009. Was the scope of the operation of the Civil Aviation Law different prior to that date? Other operators have different content in their manuals. Is the scope of the operation of the Civil Aviation Law different for those operators? The operations manual is not a law

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[86] See paragraph 15 above. The charge was laid against the first respondent, not the Chief Pilot or the Pilot, but these arguments do not turn on any distinction between the first respondent's duties and the Chief Pilot's.

[87] Reasons, [55] incorrectly referring to duties referred to at [53] instead of [49]. See also Reasons, [91]-[92], [99] per Riley J.

[88] Operations Manual (extract) dated 1 September 2009, A4.07, A6.18, D1.02 **ABFM 5**.

or legislative instrument.[89] It is not of general application and does not confer rights or obligations, although it is a factum upon which statutory rights and obligations operate.[90] The operations manual of a single operator does not form part of the extrinsic materials to which an interpreting court might have regard when considering the law in context.[91] The content of the operations manual could have no rational bearing on the objective intention of the Parliament.[92]

50. Secondly, the plurality reasons disregarded the effect of s 28BE(5) of the CAA, following the view taken in *Heli-Aust* (Reasons, [58], [97]-[98]). The duty under s 28BE(1) is of considerably more general application than the specific obligations found elsewhere in the Civil Aviation Law, which generally require the doing or refraining from doing of particular things, such as maintaining minimum crew numbers,[93] maintaining an appropriate organisation and effective management structure,[94] and not contravening directions from CASA.[95] Section 28BE(1) creates a general statutory duty of care in respect of every activity covered by the AOC, and everything done in connection with such an activity. The first respondent's AOC relevantly authorised the first respondent to operate the aircraft in passenger charter operations in Australia.[96] Every activity referred to at paragraphs 10 to 14 above fell within the scope of the AOC or was an activity in connection with an activity within that scope. However, s 28BE(5) provides that the general statutory duty does not affect any duty imposed by, or under, any other law of the Commonwealth, a State or Territory. This subsection does two important things. First, it expressly confirms that the scope of operation of the Civil Aviation Law in its entirety is not

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[89] *Legislation Act 2003* (Cth) ss 8 and 9; *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185.

[90] See, for example, CAR 215.

[91] *Interpretation Act 1901* (Cth) s 15AB; Pearce and Geddes, *Statutory Interpretation in Australia* (8th ed, 2014), Ch 3.

[92] *Zheng v Cai* (2009) 239 CLR 446 at [28] and the other authorities referred to in footnote 27 above.

[93] CAR 208.

[94] CAA s 28BF(1)

[95] CAR 215(3A).

[96] **ABFM 15.**

coterminous with the scope of its exclusive operation (if any[97]).[98] That proposition can similarly be discerned from the myriad subject matters touched on but not comprehensively dealt with by the Civil Aviation Law.[99]

51. The failure of the Court of Appeal to recognise and account for this explains its uncritical leap from a description of the field of operation of the Civil Aviation Law (at Reasons [52], [99]) to consideration of whether the NT WHS Act entered (on the agreed facts or in the charge) the described field, resulting in failure to come to terms with the relevant operation of s 28BE(5).[100]

52. The second thing s 28BE(5) does is to remove any argument that the general duty in s 28BE(1) intends to exclude the operation of the NT WHS Act, or any other Act.[101] In other words, the terms of s 28BE(5) state clearly and unmistakably why the formulation of duties at Reasons [48] do not advance the task of finding in the Civil Aviation Law an intention to operate to the exclusion of the NT WHS Act as pleaded in the complaint.

First respondent's notice of contention

53. On the premise that this Court answers either of the first two questions in paragraph 3 above in the negative, the first respondent seeks to uphold the decision of the Court of Appeal on alternative grounds that the broad workplace duty under s 19(2) of the NT WHS Act, which is picked up as a criminal offence under s 32 and gives rise to reciprocal obligations of due diligence under s 27(1), if operative, would vary, detract from or impair the operation of identified provisions of the Civil Aviation Law.[102] Our present response to this case is necessarily brief given it was not developed in argument below, save in two paragraphs of written submissions.

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[97] In *Airlines No 2*, the High Court held that the Civil Aviation Law as in force at that time was not exclusive of State law relating to the authorisation of aircraft operators and the licensing of pilots involved in intra-State air navigation.

[98] See also CAA s 32.

[99] See, for example, s 28BI dealing with personal injury liability insurance requirements; CARs 42Z, 82-85, 159 dealing with radiocommunication; CARs 96, 150 dealing with waste disposal; CAR 290 dealing with firearms.

[100] Reasons, [52]-[53], [58] per Southwood J (Blokland J agreeing), [91]-[92], [97], [99] per Riley J.

[101] *Momcilovic* at [266]-[272] per Gummow J (French CJ agreeing at [111], Bell J agreeing at [660]), [486] per Heydon J, [654] per Crennan and Kiefel JJ; *R v Credit Tribunal; ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564 per Mason J (Barwick CJ, Gibbs, Stephen and Jacobs JJ agreeing).

[102] See notice of contention **CAB 111-112.**

54. Section 27 of the NT WHS Act is not engaged in the circumstances of this case and should be disregarded as the single charge on complaint is directed at the first respondent only.

55. Section 28BD of the CAA relevantly requires the holder of an AOC to comply with all requirements of the CAA, the regulations and the CAOs that apply to the holder. Failure to do so may be an offence under s 29(1) of the CAA if the holder operates or permits the aircraft to be operated and the operation of the aircraft results in the aircraft being flown or operated without compliance. The requirements of CAR 215 that apply to the holder of an AOC are requirements to provide an operations manual[103] containing such information as necessary to ensure the safe conduct of flight operations,[104] to revise the content of the manual from time to time where necessary,[105] and not to contravene a direction from CASA regarding the content or revisions to the operations manual.[106] The requirements of CAO 82.7 that apply to the holder are that they must provide sufficient qualified personnel,[107] appoint a Chief Pilot[108] having certain responsibilities including ensuring compliance with loading procedures,[109] provide and maintain facilities and documentation sufficient to enable the operator to conduct services with safety,[110] and include certain content if relevant in the operator's operations manual.[111] CAR 92(1) relevantly prohibits a person from taking off from a place that is not an aerodrome or suitable for use as an aerodrome for the purpose of taking off.

56. The inconsistency or real conflict between those provisions of the Civil Aviation Law and ss 19(2) and 32 of the NT WHS Act is not readily apparent. If it exists, it must be because the identified provisions of the Civil Aviation Law containing particular prohibitions should be construed as deliberately permitting any conduct

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[103] CAR 215(1), (6) and (7).

[104] CAR 215(2).

[105] CAR 215(5), (8).

[106] CAR 215(3), (3A).

[107] CAO 82.7 [5.1].

[108] CAO 82.7 [5.2].

[109] CAO 82.7 Appendix 2, [3.2](e).

[110] CAO 82.7 [5.4].

[111] CAO 82.7 [5.6].

not falling within their terms and so to the extent that the duty under s 19(2) of the NT WHS Act enforceable by criminal sanction under s 32 operates to prohibit what those provisions permit there is an inconsistency of the kind considered in *Dickson v The Queen* (2010) 241 CLR 491 (esp at [22]).

57. The immediate answer to that submission is that the suggested construction of the identified provisions as impliedly but deliberately permitting what they do not prohibit would bring those provisions into conflict with other provisions of the Civil Aviation Law and other Commonwealth laws, most obviously s 28BE(1) of the CAA and ss 19(2) and 32 of the Ch WHS Act, both of which impose similarly general duties of reasonable care and diligence capable of coexisting, with the provisions identified in the notice of contention. That constructional choice should be rejected in favour of one which infers an intention that they coexist.

Part VII:

58. The orders should be:
    (1) Appeal allowed.
    (2) The orders of the Court of Appeal made on 19 October 2017 and the costs orders made on 28 March 2018 are set aside.
    (3) The first respondent is to pay the costs of the appellant in this Court and below.

Part VIII:

59. It is estimated the appellant will require three hours for oral submissions.

Dated: 8 June 2018

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