IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY No. D4 of 2018

BETWEEN: **WORK HEALTH AUTHORITY**

Appellant

and

OUTBACK BALLOONING PTY LTD

First Respondent

and

DAVID BAMBER

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

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Part I: Publication

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

Part II: Issues

2. Does Commonwealth Civil Aviation Law (a term explicated at [6] below) exclude the operation of ss. 19, 27 and 32 of the *Work Health and Safety (National Uniform Law) Act* (NT) **(WHS Act)** in so far as those provisions would otherwise: (a) prescribe standards for the safety of passengers during the embarkation procedure to a hot air balloon near Alice Springs on 13 July 2013; or (b) enable the enforcement of such standards?

3. Do ss. 19, 27 and 32 WHS Act or any of them vary, detract from or impair the specific operation of any of ss. 28BD and 29(1) *Civil Aviation Act 1988* (Cth), r. 215 *Civil Aviation Regulations 1988* (Cth) **(CAR)** or *Civil Aviation Order* 82.7?

4. Do ss. 19, 27 and 32 WHS Act or any of them vary, detract from or impair the specific operation of r. 92(d) CAR?

Part III: Notice of Constitutional Matter

The First Respondent's notice pursuant to s. 78B of the *Judiciary Act 1903* is at **CAB 113.**

Part IV: Facts

5. The Appellant does not have leave to appeal against the findings of fact referred to at AS [14]. Southwood J's reference to Mr Livingston as the Chief Pilot should have been to the Pilot-in-Command. The Appellant derives no assistance from that slip. The inference that Mr Livingston supervised the boarding was correctly drawn based on the primary facts that the pilot instructed the passengers to pre-load; the pilot was standing next to the burners at the front of the basket; the other staff member was at the other end of the balloon; and that following the decedent's scarf being caught by the fan the fan was turned off by the pilot and the other staff member called.[1]

Part V: Response to Appeal

6. **Identification of the Civil Aviation Law**: Commonwealth Civil Aviation Law comprises the *Air Navigation Act 1920* **(ANA)**, *Civil Aviation Act 1988* (**CAA**), *Civil Aviation Regulations 1988* (**CAR**), *Civil Aviation Safety Regulations 1998* **(CASR)** together with *Civil Aviation Orders* (**CAOs**) made pursuant to the CAA and registered as Legislative Instruments pursuant to the *Legislation Act 2003*. On enactment, the CAA substantially re-enacted parts of the ANA which were repealed, to give effect to a reorganization of the Commonwealth executive agencies responsible for aviation

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[1] **ABFM** page 2.9 – 3.2.

regulation. At the same time, the enactment of the CARs in 1988 represented substantially the re-enactment of the *Air Navigation Regulations* (**ANRs**) which were then in force under the ANA. Since that time, the CASRs have been enacted to harmonise the CARs with United States Federal Aviation Regulations.[2] Consequently, the CAA and the instruments made under it, including CAR, CASR and CAOs, are to be construed in the context of the ANA and of the legislative history of the ANRs. The CAOs which form part of the law are given force of law by s. 98 (4A), (4B), (5) and (5AAA) of the CAA.

7. **Summary of First Respondent's case:** The Civil Aviation Law, as just identified, is to be construed as *the* Australian law prescribing safety standards for air navigation and air operations and providing for their enforcement for four interlocking reasons:

(a) The Civil Aviation Law is enacted to give effect to Australia's obligations under the Chicago Convention, obligations which positively require that Australia's law on the prescription and enforcement of safety standards for civil aviation be national and uniform;

(b) The terms of the CAA itself show an intention that the Civil Aviation Law operates comprehensively and uniformly in relation to the safety of air navigation in Australia;

(c) the comprehensive and detailed terms of the Civil Aviation Law, taken as a whole, evince an intention to regulate comprehensively and uniformly the safety of air navigation in Australia;

(d) The legislative and constitutional history of the Civil Aviation Law confirms that it was developed as *the* sole and uniform law of Australia, including with respect to safety of air navigation in Australia.

8. The First Respondent considers that it is necessary to consider these matters, especially the international context and legislative and constitutional history, in greater detail than undertaken by the Appellant or any of the intervenors. Accordingly, these submissions shall first deal sequentially with:

(a) The international obligations to which the Civil Aviation Law responds (paagraphs 11 to 21);

(b) The specific role of Annex 19 to the Chicago Convention in regulating safety (paragraphs 22 and 23);

(c) The terms of the CAA (paragraphs 24 to 28);

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[2] CASR r. 1.003.

(d) The terms of the CAR and CASR (paragraphs 29 to 34);

(e) The history of the *Air Navigation Act* (paragraphs 35 to 44); and

(f) The history of the *Air Navigation Regulations* (see paragraphs 45 to 49 below).

9. Next, these submissions shall demonstrate that a series of provisions of the CAA, CASR and CAR, taken together, confirm that the air navigation and air operations exclusively regulated by the Civil Aviation Law comfortably include the inflation and embarkation operations of a hot air balloon, both in general and as undertaken in the present case, leaving no room for a Territory (or State law) to impose its own safety obligations or its own mechanisms for enforcement of such obligations (see paragraphs 50 to 66 below).

10. Next, these submissions shall demonstrate why the advent of various work health and safety (**WHS**) laws, whether at Commonwealth, State or Territory level, has nothing to say about the exclusivity of the "field" covered by the Civil Aviation Law. Where such WHS laws enter the field defined above they must, by the appropriate legal technique in the particular case, "give way" to the Civil Aviation Law (see paragraphs 67 to 95 below). Finally, certain other responses are made (see paragraphs 96 to 116 below).

11. **The international obligations:** On 7 December 1944 Australia, together with 37 other nations entered into the Chicago Convention dealing with air navigation (**Chicago Convention**). The Chicago Convention came into force in 1947. Act No. 7 of 1947, being an amendment to the ANA, approved the ratification on behalf of Australia. Section 3A of the ANA as currently in force authorizes the ratification on behalf of Australia of each of the amendments made to the Chicago Convention up to that made on 26 October 1990[3].

12. The CAA represents a core part of Australia's implementation of the Chicago Convention. By s. 11, the Civil Aviation Safety Authority (**CASA**, the Authority established to administer the CAA) is required to perform its functions in a manner consistent with the obligations of Australia under the Chicago Convention. The power to make regulations under the CAA is defined by s. 98(1) to extend to making regulations for the purpose of carrying out and giving effect to those provisions of the Chicago Convention which relate to safety.

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[3] Amendments made since 1990 to Art 61 (ICAO budgeting processes), Art 83bis (transfer of registration of leased aircraft between member States) and Art 93bis (automatic expulsion of member States which are expelled by the General Assembly of the United Nations) are not the subject of legislation authorizing their ratification but they have each commenced in force.

13. The Chicago Convention requires a high degree of uniformity of regulation of civil aviation, including with respect to safety. Article 12 requires member states to keep their own regulations relating to the flight and manoeuvring of aircraft uniform to the greatest extent possible with those established from time to time under the Chicago Convention and requires each contracting State to ensure the prosecution of all persons violating such regulations. Article 28(b) requires member States to adopt and put into operation operational practices and rules which may be recommended or established from time to time pursuant to the Convention.

14. Articles 31 to 33 provide for certification of the airworthiness of aircraft and of the competency of crew, for crew licensing and for the recognition by each member State of the certificates and licences so provided by other member States.

15. Article 37 obliges each member State to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

16. The balance of Article 37 together with Articles 38, 54(l) and 90 provide for the Council of the International Civil Aviation Organisation (**ICAO**) to promulgate Standards and Recommended Practices as Annexes to the Chicago Convention and to oblige each member State to bring its regulations and practices into full accord with any such Annex or to notify ICAO of a difference. A list of Annexes as made, and the Australian legislation giving effect to each, is at **RBFM page 6.**

17. By Article 80 each member State undertook to immediately denounce the earlier convention relating to the regulation of aerial navigation signed at Paris on October 13, 1919 (**Paris Convention**).

18. The Paris Convention had been entered into for Australia and other British Dominions by the government of Great Britain. It had contained provisions later to be expanded in the Chicago Convention. Articles 12 and 13 provided for certificates of competency and licenses to be issued to crew and certificates of airworthiness to be issued in respect of aircraft and for the recognition of those certificates and licenses issued by any State party by the other parties to the Convention.

19. Article 14 required the State parties to each implement a uniform regulation requiring the carrying of wireless communication equipment on any aircraft carrying ten or more persons.

20. Articles 34(c) and 39 provided for the making and amendment of Annexes to the Paris Convention by an International Commission which when made would be binding on each State party. The Annexes concerned: (A) the marking of aircraft; (B) certificates of airworthiness; (C) log books; (D) rules as to lights and signals and rules of the air; (E) minimum qualifications necessary for obtaining certificates as pilots and navigators; (F) international aeronautical maps and ground markings; and (G) collection and dissemination of meteorological information. As long ago as 1936 this Court proceeded in conformance with the reasoning of the Privy Council on the basis that "the terms of the Convention include almost every conceivable matter relating to aerial navigation".[4]

10 21. When taken as a whole, the Chicago Convention imposes an obligation upon Australia to secure uniformity of regulations, standards, practices, procedures and organisation of air navigation throughout Australia as a step towards uniformity between Australia and the other contracting States in relation to regulations, standards, practices, procedures and organisation in civil air navigation.[5]

22. **Annex 19 to the Chicago Convention specifically regulates safety**: By the time of the present incident, Annex 19 to the Chicago Convention had come into force.[6] The Annex provides for safety management systems. "Aircraft" is defined in the Annex in terms which extend to a hot air balloon and "safety" is defined as "the state in which risks associated with aviation activities, related to, or in direct support of the operation of

20 aircraft, are reduced and controlled to an acceptable level." The inflation and embarkation of a hot air balloon are each aviation activities related to or in direct support of the operation of that hot air balloon.

23. By clause 3.1.1 Annex 19 obliges Australia to establish a State Safety Program (SSP) and by clause 3.2 to establish and implement a Safety Oversight System. The Safety Oversight System is prescribed by Appendix 1 and requires a comprehensive and effective aviation law that enables Australia to regulate civil aviation. The law is required to comprise primary aviation legislation and specific operating regulations (clauses 1 and 2). Safety oversight functions are to be performed by a specialist national aviation regulatory body (clauses 3 and 4). State surveillance and enforcement functions must be conducted in

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[4] Per Latham CJ in *R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 634.9 citing in *Re Regulation and Control of Aeronautics in Canada* [1932] AC 54 at 77; [1931] PC 38 at 12.

[5] Per Barwick CJ in *Airlines No. 2* at 86 to 87, see also Taylor J at 126.8, Menzies J at 138 – 139 and 144 – 145, Windeyer J at 152 and Owen J at 158 – 159.

[6] The Annex was adopted by the Council of ICAO on 25 February 2013, bringing together safety management provisions previously located in other Annexes, in particular Annexes 6 and 13.

accordance with a documented process (clauses 7 and 8) by agencies established for that purpose (clause 1.1). A framework for the SSP is contained in Attachment A to the Annex. Clause 1.1 of that attachment indicates that the States' legislative framework and specific regulations be national. There is to be a single enforcement policy (clause 1.4); the State will establish controls which govern how service providers will identify hazards and manage safety risks; and the State will implement measures to ensure the identification of hazards and the management of safety risks by service providers in accordance with established regulatory controls (clauses 2.1 and 3.1).

24. **Exclusivity is expressed in the *Civil Aviation Act* itself**: The safety of civil aviation is the preeminent focus of the CAA.[7] In conformance with Annex 19, the Act is Australia's primary aviation legislation which authorises the CAR, CASR and CAOs as specific operating regulations; and establishes CASA as Australia's single specialist aviation safety regulator.[8] CASA's functions include development and promulgating of appropriate clear and concise aviation standards; development of effective enforcement strategies to secure compliance with those standards; conducting comprehensive aviation industry surveillance including assessment of safety related decisions taken by industry management at all levels for their impact on aviation safety; and providing comprehensive safety, education and training programs. None of those functions, as conferred, is capable of being shared with agencies of the states and territories.

25. CASA, in turn, must perform its functions in accordance with Australia's obligations under the Chicago Convention.[9]

26. The CAA binds the Crown in right of the Commonwealth, each of the States and each of the internal Territories[10] and extends to all the external Territories.[11] It operates in respect of foreign registered aircraft travelling to or from Australia[12] and to Australian aircraft both within Australia and outside Australia.[13]

27. Central to the CAA's regulatory scheme is CASA's regulation of operators as operators. CASA has the function of issuing Air Operators Certificates (**AOCs**) and both the flying and (the broader concept of) operation of aircraft in Australia is prohibited

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[7] Sections 3A and 9A.
[8] Sections 8 and 9.
[9] Section 11.
[10] Section 5.
[11] Section 6.
[12] Section 7A.
[13] Section 27(2)(c).

without an AOC.[14] The matters of which CASA must be satisfied if it is to issue an AOC involve a comprehensive assessment of the putative operator's, organisation, chain of command, personnel, facilities, procedures and practices to ensure the safety of all of its proposed operations – wherever they occur.[15] AOCs when issued are subject to general conditions specified in s. 28BA. The AOC does not authorise any flight or operation of an aircraft to which a condition specified in the CAR, CASR or CAOs relates while that condition is breached,[16] and any such operation would constitute an indictable offence.[17] The AOC is subject to a condition that the holder comply with all requirements of the CAR, CASR or CAOs.[18]

10 28. It is improbable in the extreme that the Parliament intended that standards governing the safety of crew and passengers on board international or interstate flights would change at the points at which a flight passes into or out of the airspace over a state or territory or might differ at the departure and destination aerodromes – but that would be the consequence of the Civil Aviation Law not being *the* law on the matters it covers.

29. **Exclusivity is further expressed in the CAR and CASR:** Regulation 3(1) of the CAR provides for the comprehensive application of the regulations throughout Australia including the Territories and purely intrastate air navigation.

30. Sub- regulation 3(1)(g) is based on ANR regulation 6(1)(f), the origins of which were as follows. In *Airlines of New South Wales Pty Ltd v New South Wales (Airlines No. 1)*[19] this Court disposed of a challenge to State (economic) licensing provisions on the basis that the ANRs did not, as a Federal law, apply to intrastate carriage. Dicta suggested that the development of civil aviation in Australia was such that the operation of the ANRs as Federal law need not be so limited.[20]

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31. In reliance upon those dicta, the Commonwealth decided to assume comprehensive legal control over civil aviation.[21] ANR 6(1)(f) was inserted to apply the ANRs to "all air navigation within Australian territory of a kind not specified in" the other paragraphs of

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[14] Section 27(1).
[15] Section 28.
[16] Section 28(BA)(1)(b) and (2A).
[17] By reason of s.27(2)(b) operating with s. 29(1)(b)(ii).
[18] ss. 28(1)(a) and 28BD
[19] (1964) 113 CLR 1.
[20] Per Dixon CJ at 113 CLR 27, Taylor J at 39, Menzies J at 47 – 48, Windeyer J at 50 – 51.
[21] Richardson JE: "Aviation Law in Australia" [1965] Fed. L.R. 242 (**Richardson**) at 257.

ANR 6. It was designed to achieve one end only – the extension of the application of the ANRs to all intrastate air navigation.[22]

32. That extension of the application of the ANRs was upheld by this Court in *Airlines of New South Wales Pty Ltd v New South Wales (No. 2) (Airlines No. 2)*.[23] The reasoning included reference to the comprehensive and detailed nature of the ANRs.[24] Specific reliance was placed on the licensing provisions in Part XIII of the ANRs.[25] Barwick CJ, in dissent, held that the ANRs were the only law to operate with respect to the licensing or authorising of aircraft for use in public air transport operations.[26] Relevant to the present case, the majority[27] held the Commonwealth's prohibition on the commercial operation of intrastate air services was a valid exercise of the trade and commerce power: because uniformity in the operational regulation of all civil aviation was required or contributed to the regulation of interstate and international civil aviation.[28] Professor Richardson explained the case as meaning that the Commonwealth could make its navigational laws applicable to all flying operations in Australia, with the States left only to exercise licensing control for non-navigational reasons.[29] The Civil Aviation Law validly regulated intrastate air navigation pursuant to the trade and commerce power because it was the uniform law regulating the operation of aircraft.

33. The subject matter addressed by the CAR is wide ranging and detailed, extending over five volumes. Volume 1 deals with administration and organisation, airworthiness and maintenance directions and defect reporting to CASA. Volume 2 concerns the testing and licensing of flight crew of balloons. Volume 3 contains regulations concerning navigation logs, radio systems, aerodromes, air traffic services, conditions of flight, rules of the air, signals for the control of air traffic, the licensing and requirements for air service operations, the refusal to grant suspension and cancellation of licences, certificates and authorities as well as penal and prosecution provisions. Volume 4 addresses aircraft maintenance schedules and the CASA system of certification. Volume 5 contains notes

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[22] Per Taylor J in *Airlines No. 2* at 123.
[23] (1965) 113 CLR 54.
[24] Per Barwick CJ at 94.3, per Windeyer J at 151.4 - .6, per Owen J at 166.3 - .4.
[25] Per Barwick CJ at 83.2 and 94 and Owen J at 162.
[26] At 95.
[27] Barwick CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.
[28] Per Barwick CJ at 78, Kitto J at 116 – 117, 125 and 128, per Menzies J at 141 – 142, per Taylor J at 127.3, per Windeyer J at 151 and Owen J at 166.5 and 166.8 – 167.2.
[29] Richardson at 259.

and tables of amendments. Part 14, which is in Volume 3, largely re-enacts the provisions of Part XIII of the ANR considered in *Airlines No. 2*.

34. Progressively the CARs are being repealed and replaced by the CASR.[30]

35. **The history of the *Air Navigation Act*:** A full and accurate history is in Taylor J's reasons in *Airlines No. 1*.[31] When first enacted, the *Air Navigation Act* merely provided for the making of regulations to carry out and give effect to the Paris Convention and for the control of air navigation in the Commonwealth and in the Territories.[32] The Act was passed in the context of an agreement with the States to refer power over air navigation.[33]

36. While Tasmania, Victoria, Queensland and South Australia passed legislation referring powers[34], only Tasmania's ever came into force. In November 1936 this Court restrained the hearing of charges against Henry Goya Henry for flying on an intrastate flight over Sydney in contravention of the ANRs while his Commonwealth licence to fly was suspended.[35] The Court reasoned that while the Commonwealth had power pursuant to the external affairs power to give effect to the Paris Convention it had not done so; and the trade and commerce power did not authorise regulation of intrastate flights.

37. The following month, on 7 December 1936, the ANA was amended so that the power to make regulations extended to carrying out the Paris Convention and in relation to constitutional trade and commerce or within any Territory of the Commonwealth.[36]

38. A referendum to confer power on the Commonwealth to make laws with respect to air navigation and aircraft was defeated in early 1937.[37] In April 1937 there was a conference of the governments of the Commonwealth and the States at which it was resolved that there should be uniform rules throughout the Commonwealth applying to air navigation and aircraft, the licensing and competence of pilots, air traffic rules and the regulation of aerodromes.[38] Each of the States promptly enacted legislation applying the ANRs as in force from time to time in Commonwealth Territories as laws of the respective States to the extent that they did not operate as laws of the Commonwealth.[39] With the

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[30] CASR 1.003.
[31] At 33 – 38.
[32] Act No. 50 of 1920.
[33] Second Reading Speech of Sir Granville Ryrie, House of Representatives, Hansard 22 November 1920.
[34] Tasmania Act No. 42 of 1920, Victoria Act No. 3108, South Australia Act No. 1469, Queensland Act No. 30 of 1921.
[35] *R v Burgess; ex parte Henry* (1936) 55 CLR 608.
[36] Act No. 93 of 1936.
[37] Richardson at 252.
[38] See the preamble to each of the State Acts listed in the footnote following.
[39] *Air Navigation Act 1937* (SA); *Air Navigation Act 1937* (WA); *Air Navigation Act 1937* (Tas); *Air Navigation Act 1937* (Qld); *Air Navigation Act 1938* (NSW); *Air Navigation Act 1937* (Vic).

exception of the Victorian Act, those State Acts remain in force[40]. The Victorian Act was repealed and substantially re-enacted by the *Air Navigation Act 1958* which has since been repealed.

39. Following the failure of the Commonwealth powers referendum in August 1944, Act No. 6 of 1947 amended the *Air Navigation Act* to approve the ratification by Australia of the Chicago Convention and to expand the power to make regulations under the Act to encompass the purpose of carrying out and giving effect to the Chicago Convention or any other international convention, pursuant to the trade and commerce power, the defence power, the postal power, the Territories power or a power referred to the Commonwealth by a State. Later in 1947, a second amending Act further expanded the power to make regulations to include prescribing all matters in respect of air navigation with respect to which the Parliament had power to make laws and prescribing all matters necessary or convenient to be prescribed in respect of air navigation within any Territory of the Commonwealth.

40. A substantial re-writing of the ANA was effected by Act No. 39 of 1960. The text of the Chicago Convention was included in the Act as a schedule and various provisions for the conduct of international air services to and from Australia which had previously been dealt with in the ANRs were incorporated in the Act. In his Second Reading Speech the Minister, Mr Townley, explained that the bulk of regulatory provisions would remain in the ANRs because *first*, the State legislation of 1937 gave intrastate effect only to the ANRs and *second*, because Australia's compliance with its obligations under the Chicago Convention necessitated frequent and extensive amendments to the ANRs which might prove difficult in practice to achieve by amendment of Acts.[41]

41. The regulation-making power was in substance re-enacted in s. 26. The Minister specifically referred to the Commonwealth's wide power with respect to the Territories and its reliance upon that power to support the ANRs as they were adopted by the State laws of 1937 for intrastate carriage.[42]

42. By Act No. 124 of 1974 the definition of "aircraft" was amended, placing beyond doubt that hot air balloons were "aircraft" as defined.

43. By Act No. 27 of 1980, s. 2A of the ANA was amended following Northern Territory self-government so that the Act now bound the Crown in right of the

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[40] But of no effect in the regulation of operational matters since *Airlines No 2.*
[41] House of Representatives, Hansard, 17 May 1960 page 1764.
[42] House of Representatives, Hansard, 17 May 1960 page 1770.

Commonwealth, each of the States and the Northern Territory. A new s. 26(5) was inserted providing that a law of the Northern Territory did not have effect to the extent that it was inconsistent with the ANRs. The equivalent provision is now in CAA s. 98(7).

44. On 7 October 1987 major changes to Australian aviation policy, including the termination of the two airlines agreement were announced in a parliamentary statement by the then Minister for Transport, Senator Evans.[43] Safety regulation and safety related service provision was to be moved from the Department to a new Civil Aviation Authority[44]. The CAA was enacted in 1988 to support that restructure, largely re-enacting provisions then in force in the ANA and ANR. It was cognate with the ANA, which continued to authorise the ratification of the Chicago Convention which is attached as part of that Act. The Regulation making power in s. 98 of the CAA substantially re-enacted the power in s. 26 of the ANA but limited to safety.

45. **The history of the *Air Navigation Regulations*:** The ANRs were first enacted as Statutory Rule 33 of 1921. They were comprehensive and dealt with the subject matter of each part of the Paris Convention. The regulations were divided into parts (I) preliminary; (II) conditions of flying with Division 1 being general and Division 2 conditions as to safety; (III) aerodromes; (IV) registration of aircraft including registration and inspection and certificates of airworthiness; (V) licensing of personnel; (VI) registration and nationality marks; (VII) logbooks; (VIII) lights and signals; (IX) rules of the air; and (X) miscellaneous. Significantly more detailed regulations were enacted in substitution for the 1921 ANRs by Statutory Rule 156 of 1936. Application of the regulations was limited by Regulation 5. Part IX, which dealt with lights and signals and rules of the air, applied to all aircraft engaged in air navigation in or above Australia. The other provisions applied only to international navigation and aircraft engaged in air navigation in one or more of the Territories.

46. Technical work on certain Annexes to the Chicago Convention commenced after the 1944 conference but before the Convention came into force. For example work on Standards and Recommended Practices for the operation of aircraft in international commercial air transport was undertaken by the Operations Division of ICAO at its first session in April 1946,[45] and work on rules of the air was undertaken by the Rules of the

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[43] Senate Hansard, 7 October 1987 page 748, to which reference is made in the Second Reading Speech for the *Civil Aviation Bill 1988* at House of Representatives, Hansard, 14 April 1988.

[44] CASA was formed in 1995 when the service delivery aspects of the Civil Aviation Authority were split off to AirServices Australia pursuant to the *Air Services Act 1995.*

[45] See current edition of Annex 6 page XVII.

Air and Air Traffic Control Division at its first meeting in October 1945.[46] Consequently when the ANRs were re-enacted by Statutory Rule 112 of 1947 they were even more detailed and comprehensive.[47] The Regulations provided in Part II Division 1 for their administration by the Commonwealth Department of Civil Aviation in close liaison with the Department of Air (Reg 7); in Part IV for airworthiness requirements including certificates of airworthiness, certificates of safety of aircraft and the control of the maintenance of aircraft; Parts V and VI for the training, licensing and rating of operating crew; Part IX concerned aerodromes and other facilities.

47. Part X, concerning the conditions of flight, included a prohibition on the operation of an aircraft in a negligent or reckless manner so as to endanger life or the property of others (Regulation 124). Part XIII concerned the classification, licensing and safety regulation of air service operations. Regulation 191(c) provided for charter operation of the kind conducted by the First Respondent in this matter. Regulation 194 provided for the regulator to determine minimum operating crew.[48] Division 1 of Part XIII provided for a licensing system including for charter operators (Regulations 197 and 199). Division 2 of Part XIII specified requirements to ensure the safety of airline operations. Included in that Division was Regulation 212 requiring preparation and use of operation manuals. Regulation 217 required that an airline provide such facilities and safety devices for protection of the public at the aerodromes normally used by the airline as the Director-General directed. Division 3 of Part XIII concerned the conduct of airline operations. The pilot in command of an aircraft was made responsible for the safety of persons and cargo carried on aircraft and had authority as to the disposition of the aircraft while he was in command (Regulation 219). Operators of aircraft were required to establish a check system to be followed by the pilot in command and other members of the crew before take-off (Regulation 224). There was specific provision for regulation of the flight of free balloons (Regulation 250). Part XV provided for enforcement. It included provision for suspension, cancellation and amendment of licenses and certificates and for merits review of such decisions. In Division 5 it provided for air courts of enquiry into any "accident" including any charge of incompetency or misconduct on the part of any licence-holder

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[46] See Annex 2 current edition page V.
[47] A useful summary is provided by Owen J in *Airlines No. 2* at 159 – 163.
[48] The determination was to be by the Director-General and not by the pilot or operator: per Barwick CJ, Taylor and Owen JJ in *Australian Federation of Air Pilots & Ors v The Flight Crew Officers Industrial Tribunal & Ors* (1968) 119 CLR 16.

(Regulation 291). Part XVII concerned penal provisions and Regulation 312 created an offence of contravening or failing to comply with any provision of the ANRs.

48. From 1937 to 1963 most of the ANRs did not purport to apply to intrastate air navigation except for that which occurred in controlled air space directly affecting or endangering the safety of persons or aircraft engaged in territorial international or interstate air navigation.[49] In that time the State Acts of 1937 – 1938 applied the ANRs as laws of the States to intrastate air navigation. On 2 October 1964 ANR 6(1)(f) came into force[50] and from that date the ANRs applied to intrastate air navigation as a law of the Commonwealth.

49. **Conclusions from the history of the ANA and ANR**: The necessity for uniform legislative control over air navigation, including the central issue of safety standards, has been recognised since 1920. The response has proceeded in three ever-expanding stages. First, at all times from 1920, there has been effective uniform control, to the extent of the Territories and international flight operations, and for all air navigation in Australia in the application of rules of the air. Second, from 1937 to 1964 the ANRs were enacted in light of the State laws reciting the objective that they were to be a uniform law applying to air navigation. Uniformity was achieved, by a mix of Commonwealth and State law. Third, from 1964 the ANRs were re-enacted as *the* national law applying to all air navigation in Australia and by Australian registered aircraft. The current CAR and CASR continue that national approach, leaving no room for any State or Territory to prescribe (or enforce) its standards for air navigation in general or safety thereof in particular.

50. **The reach of the operations to which the Civil Aviation Law applies**: Reasoning in this Court has long shown that the "air navigation" to which the Paris Convention referred, the Chicago Convention refers and the Civil Aviation Law uniformly regulates, comprehends the carriage of goods and passengers by air and all matters preparatory to flying by air, incidental thereto and consequent thereon.[51] In particular, it encompassed the inflation and embarkation of a hot air balloon (as much as it would encompass the manoeuvring of an aeroplane into a position where it could receive passengers and crew and their embarkation on it).

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[49] Richardson at 254.
[50] Per Barwick CJ in Airlines No 2 at 73
[51] See Dixon J in *R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 670 and Menzies and Owen JJ in *Airlines No. 2* (1965) 113 CLR 54 at 136 to 137 and 160.

51. CAA s.20A creates an offence of reckless operation of an aircraft[52]. As s.27 CAA shows, "operation" of an aircraft is broader than conduct of flight in an aircraft. It extends to the inflation and embarkation of a balloon.

52. CASR Part 31 provides for the airworthiness of hot air balloons. CAO 101.54 prescribes further detail. Each hot air balloon must have a flight manual which specifies the minimum flight crew, the maximum permissible number of occupants, normal procedures for the safe operation of the balloon including checklists as appropriate to the operation of the balloon and information necessary to ensure safe loading of the balloon.[53]

53. CASR 31.001 and 31.002 provides for reference to the European standard for hot air balloon airworthiness. That standard again requires that flight manuals include operating limitations for normal procedures including for inflation and that instructions for continued airworthiness include handling instructions.[54]

54. CAR 54 requires an AOC holder to ensure its aircraft flight manuals are appropriate.

55. Part 5 of the CAR, which constitute the whole of Volume 2 concern balloon flight crew licensing and give effect to chapters 2.10 and 4 of Annex 2 to the Chicago Convention. The Annex prescribes the international standards for training and licensing of free balloon pilots and obliges State parties to recognise each other's balloon pilot licensing. A pilot must be knowledgeable in rules and regulations relevant to the holder of a free balloon pilot license, the principles of operation of free balloon systems, the operating limitations of free balloons, and the effects of loading on flight characteristics.[55]

56. A pilot must have demonstrated skill in pre-flight operations.[56] Further detail is prescribed in CAO 40.7.

57. CAR 5.146 specifies continuing training requirements for commercial balloon pilots including the inflation of the balloon.

58. CAR 92(1)(d) creates an offence of strict liability of engaging in conduct that causes an aircraft to take off from a place which is not suitable for use as an aerodrome for

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[52] As ANR 124 with 312 had previously.
[53] CAO Appendix II clauses 2.2, 2.3 and 2.8.
[54] The standards, provisions of which are given legislative force by CASR 31.001(1)(b) and 31.002(b), are EASA CS-31HB and EASA CS- 31GB. While it was not tendered before the Court below a copy of EASA CS – 31HB is at **RBFM page 76**. Standards CS31HB.81(b)(2) at page 91 and CS31HB.82(d)(2) at page 91 are relevant.
[55] Clause 2.10.1.2.
[56] Clause 2.10.1.3.2 and 2.10.1.4.

the purposes of taking off when the proposed take off from the place cannot occur in safety. The inflation of a hot air balloon is part of the conduct that causes it to take off.

59. Part 14 of the CAR is a re-enactment and further development of Part XIII of the ANRs which were considered by the Court in *Airlines No. 2*. It applies to an operator, such as the present, engaging in commercial operations.[57]

60. Within Part 14, CAR 215 requires that each such operator have an Operations Manual and include in that manual such information, procedures and instructions with respect to flight operations of all types of aircraft operated by the operator as are necessary to ensure the safe conduct of the flight operations.[58] The operator must ensure that its Operations Manual is a controlled document with all copies distributed within its organisation and to CASA incorporating all amendments made to it.[59] By CAO 82.7 CASA instructed, pursuant to CAR 215(3), that commercial operators of hot air balloons include in their Operations Manual information set out in the CASA's publication "Guide to the preparation of Operations Manuals" (**CAAP**).[60] Both by reason of r. 215(2) and also by force of that instruction, the operator was required to include information on:

(a) duties for operational personnel for all safety critical functions with reference to CAO 20.16.3 and in particular clause 6A, which deals with pilot and ground crew responsibilities during the loading of a balloon;[61]

(b) reference to the requirement to operate aircraft in accordance with the aircraft flight manual;[62]

(c) aircraft loading procedures to ensure safe loading and any responsibility of flight crew in respect of it;[63]

(d) safety and risk management procedures, crew communication and work procedures and crew selection and training;[64]

(e) for operators such as the first respondent, land to be used for take-off and landing;[65]

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[57] CAR 2.2.
[58] CAR 215(2).
[59] CAR 215(6) and (8).
[60] While not tendered before the Court below the CAAP is given legislative force by CAO 82.7 clause 5.6 and is reproduced at **RBFM page 8.**
[61] 1B1.10 at RBFM page 22 and 2A1.8 at RBFM page 30.
[62] 2A1.4 at RBFM page 29; the flight manual requirements are referred to in paragraphs 52 to 54 above.
[63] 2B3.2 at RBFM page 37.
[64] 2D1.17 at RBFM page 51.
[65] 3A3.1 and 3A3.2 at RBFM page 59.

(f) programs for training and checking of company staff for all aircraft operations including training programs for ground support personnel with duties in connection with the preparation for a flight.[66]

61. It followed that CAR 215(2) and (3) required the operator to deal compendiously in its Operations Manual with the safety of the inflation and embarkation operations undertaken in this case.

62. CAR 224 provides for every aircraft to be under the command of the Pilot in Command. This confers on the Pilot in Command the final authority as to the disposition of the aircraft while he or she is in command. There is no room for an operator, having designated a pilot to act as Pilot in Command to exercise any other or different authority with respect to a flight operation while the Pilot in Command is in command. The operator's control over the pilot at those times is exercised through the Operations Manual – with the pilot obliged to exercise his command in conformance with its provisions.[67]

63. CAR 221 provides for CASA to give directions on safety devices to be provided for the protection of the public at aerodromes, which includes land used for take-off, normally used by the operator.

64. CAR 235(7) and (7A) provide for CASA to give directions with respect to the method of loading of persons on aircraft. CASA has done so pursuant to CAO 20.16.3.

65. **Overall conclusions concerning Civil Aviation Law:** The various matters reviewed thus far allow the conclusions:

(a) The Civil Aviation Law evinces the intention that it is *the* law with respect to the safety of air navigation;

(b) the Full Federal Court was correct so to hold in *Heli-Aust* (2011)194 FCR 502 and the Court of Appeal was correct to follow *Heli-Aust*;

(c) "Air navigation" for these purposes extends to all matters preparatory to flying by air and incidental thereto;

(d) Specifically, "air navigation" for these purposes includes the conduct of inflation and embarkation operations to a hot air balloon; and

(e) Accordingly, no Territory or State law may prescribe the safety standards for the conduct of inflation or embarkation operations to hot air balloons or provide for their enforcement, whether generally or in this case.

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[66] 4B1.1 at RBFM page 61.
[67] CAR 215(9).

66. In contrast, a necessary consequence of the Appellant's and Commonwealth's cases is that the primary safety duties applying to those who conduct every interstate and international flight and the regulators responsible for investigating and enforcing those duties vary each time the aircraft crosses a state or territory border. The proposition that the Territory Act and the Appellant are a law and a regulator concerned with the safety of a Singapore Airline pilot's approach to, or taxiing at, Darwin airport but have no role in respect of the same flight when transitting the Arafura Sea and lining up for that approach is so improbable as to bespeak error.

67. **National Work Health and Safety Regulation?** In 1985 the Commonwealth enacted its first legislation addressing WHS. The *National Occupational Health and Safety Commission Act 1985* provided for the development and publication of advisory standards that would be available for adoption by relevant regulatory bodies – in particular the States. Nothing the National Commission did could have an executory effect.

68. The *National Occupational Health and Safety Commission Act 1985* was repealed and replaced by the *Australian Workplace Safety Standards Act 2005*. The function of the newly established Australian Safety and Compensation Council was to declare national standards and codes of practice relating to occupational health and safety matters. A standard or code of practice when so declared had no force or effect pursuant to Commonwealth legislation. The Minister, Mr Andrews, in his Second Reading Speech commented that "the Council will establish a national approach to workplace safety and workers compensation which currently does not exist in Australia".[68] The *Australian Workplace Safety Standards Act 2005* was repealed and replaced by the *Safe Work Australia Act 2008*. Safe Work Australia was established as a statutory authority of the Commonwealth with functions which included developing a national policy and strategy on WHS and workers compensation; and developing a model WHS legislative framework for adoption by the Commonwealth, the States and the Territories.

69. A fuller history is provided by Creighton and Rozer.[69] There was no national consensus on work health and safety laws prior to 2008, and such laws as the Parliament had enacted were concerned with development of national WHS standards for adoption by other regulators.

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[68] House of Representatives Hansard 11 August 2005.
[69] Creighton and Rozer: Health and Safety Law in Victoria 4th Edition (Federation Press, 2017) at [2.01] to [2.19]

70. **The Commonwealth's work health and safety laws:** The Commonwealth's first enactment of WHS laws with substantive content was by the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (**OHS Act**). That was followed in 1994 by the *Occupational Health and Safety (Maritime Industry) Act 1994* (**Maritime Industry Act**) governing occupational health and safety on government ships, and in international and interstate trade and commerce.

71. The OHS Act was retitled the *Occupational Health and Safety Act 1991* by the *OH&S and SRC Legislation Amendment Act 2006*; and was repealed on enactment of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**).

72. The duty of employers in relation to non-employees imposed by the OHS Act substantially differed from that imposed by the Maritime Industry Act and that now imposed by the WHS Act. Under the OHS Act, it was a duty to take all reasonably practicable steps to ensure that persons at or near a workplace under the employer's control were not exposed to risk to their health or safety arising from the conduct of the employer's undertaking.[70] That duty was met by acting in accordance with information provided by the manufacturer or supplier of plant.[71] An offence for breach of that duty was only committed when a person was negligent or reckless as to whether the breach would cause death or serious bodily harm.[72]

73. The Maritime Industry Act remains in force. It imposes duties on an "operator" – being the person who has the management or control of a ship. Operators have a duty to take all reasonable steps to ensure that persons at or near a workplace under the operator's control are not exposed to risks to their health or safety arising from the conduct of the operator's undertaking.[73] Like the OHS Act, the duty is met by acting in accordance with information supplied by the manufacturer or supplier of plant.[74] However, in contrast with the OHS Act, the Maritime Industry Act does not make negligence or recklessness an element of the offence of breach of that duty.

74. When enacted, the OHS Act applied only to the Commonwealth and its public authorities. In 2006 it was extended to apply to "non-Commonwealth licensees" [75] – being the corporations licensed under the *Safety Rehabilitation and Compensation Act 1992*

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[70] OHS Act s. 17.
[71] OHS Act s. 22
[72] OHS Act Schedule 2 Part 2 clause 18(c).
[73] Maritime Industry Act s. 14.
[74] Maritime Industry Act s. 28.
[75] cf. AS [27]

(Cth) under the provisions the validity of which was upheld by this Court in *Attorney-General (Victoria) v Andrews*.[76] The WHS Act applies only to the Commonwealth and its public authorities.[77]

75. The duty imposed by s. 19(2) of the WHS Act is a duty to ensure so far as reasonably practicable that the health and safety of "other persons" is not put at risk from work carried out as part of the business or undertaking. Breach of the duty is a strict liability offence.[78]

76. **Commonwealth WHS law has no impact**: The key point is that the uniformity and exclusivity that was in existence in and from 1988 from the re-enactment of the Civil Aviation Law (indeed as shown above, there from 1920 in respect to air operations in Territories or overseas and in respect of all air navigation and from 1937 for all air navigation as a combined Commonwealth/State enterprise) was not affected by enactment of any of the *National Occupational Health and Safety Commission Act , Australian Workplace Safety Standards Act, Safe Work Australia Act,* OHS Act, Maritime Industry Act or the WHS Act.

77. The three standard setting acts had nothing to say. The Maritime Industry Act and the Civil Aviation Law impose duties on "operators" in different industries. The Maritime Industry Act illustrates that Commonwealth regulation of WHS in an industry that includes interstate and international movement of vehicles, people and goods is served by industry specific legislation. In the case of aviation, that was already provided by the Civil Aviation Law. The Maritime Industry Act leaves no room for the operation of State WHS laws in respect of ships and their operators covered by that Act.

78. The OHS Act and the WHS Act each apply broad and general duties to a narrow class of Commonwealth-related entity. They must be read together with the Civil Aviation Law if that be open.[79] Each should be construed as not interfering with the uniformity of Civil Aviation Law but rather as governing health or safety at or near a Commonwealth public sector workplace, in the case of the OHS Act, and health and safety from work carried out by or on behalf of the Commonwealth public sector in the case of the WHS Act. In both cases, safety in air navigation operations is not regulated, because that is already the subject of the highly detailed and prescriptive Civil Aviation Law.

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[76] (2007) 230 CLR 369; [2007] HCA 9.
[77] WHS Act s. 12.
[78] WHS Act s. 32.
[79] *Commissioner of Police v Eaton* (2013) 252 CLR 1 at 18 [45]

79. That does not result in a textual difficulty with the inclusion of "aircraft" within the concept of workplace[80]. For example, the OHS Act regulated, and the WHS Act regulates, an employer's management of bullying conduct that occurs between work colleagues travelling together on an aircraft, and governs rostering decisions or the provision of health or other support services to flight or cabin crew, affected by injury or disease that will not affect the performance of their aviation safety functions. On the other hand the WHS Act imposes no duty on a Commonwealth public employer that operates an aircraft to concern itself during the conduct of an air operation with the manner in which a Pilot in Command communicates or otherwise deals with a flying pilot or cabin crew. They are matters governed exclusively by the Civil Aviation Law.

80. **Irrelevance of pre-existing State, Territory and Commonwealth laws on workplace health and safety**: In its submissions the Commonwealth[81] correctly points to the Robens Report as an influential document in the development of Australian WHS law and policy. That influence, however, was not uniform.

81. A central issue identified by Robens was the excessive complexity of the plethora of statutory standards applying under existing laws.[82] To address that difficulty, Robens recommended a regime of "general duties" supported by a combination of regulations and non-statutory codes and standards. The Commonwealth seeks to draw inferences from the "general duties" without reference to the regulations and the statutory and non statutory codes and standards. That approach leads to inaccuracy. In substance the Commonwealth submits that the Civil Aviation Law by its detailed industry specific code is, viewed through Robens, old fashioned. That it may be, but the history of the safety of civil aviation demonstrates it is effective.

82. It is to be recalled that until 2008 the Commonwealth's only engagement with a "national" approach to WHS was in the development of codes and standards, for adoption by the States and Territories.

83. The individual jurisdictions each approached the relationship between general duties, regulations and codes and standards differently.

84. As indicated at paragraph 72 above, the Commonwealth's OHS Act as enacted in 1991 allowed for reliance on non statutory information supplied by manufacturers and

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[80] cf AS [27] [29] and [34]
[81] CS [36] - [38].
[82] Johnstone, Bluff and Clayton: Work Health and Safety Law and Policy 3rd ed (Thomson Reuters, 2012) page 71.

suppliers of plant, and certain other persons, as compliance with the general duties. The ACT made similar provision.[83]

85. The Commonwealth alone in its OHS Act made negligence or recklessness an additional element of the offence of breach of a general duty. The Commonwealth imposed no general duty supported by a criminal sanction, absent negligence or recklessness.

86. New South Wales and the Northern Territory provided for statutory industry codes of practice, breach of which was relevant to breach of the general duties.[84]

87. Victoria and the Northern Territory provided that compliance with provisions of the Regulations relating to a general duty would constitute compliance with such a duty. [85]

10 88. The general duties imposed by Western Australia were, and remain, significantly narrower than those imposed by the Northern Territory.[86]

89. It follows that the Commonwealth's submissions that in 1988 and 1995 workplace health and safety obligations were found in almost uniform terms across the States, Territories and the Commonwealth[87] and that in 1988 there were provisions in New South Wales, Victoria, Western Australia and South Australia which were equivalent to s. 29 and 178 of the *Work Health Act 1986 (NT)*, are both inaccurate and cannot find support in the references to the Robens Report.

90. More detail on the diverse approaches taken by each of the Australian jurisdictions to implementation of Robens in Australia is found in Creighton and Rozen: Health and

20 Safety Law in Victoria (4th ed).[88]

91. That diversity of approach, taken together with the Commonwealth's legislated commitment to the development of WHS standards for adoption by WHS regulators, denies the truth of the generalised proposition that the existing state of the law nationally in 1988 or 1995 was to "impose an overarching positive obligation on operators to ensure the health and safety of workers and others visiting the workplace."[89]

92. **The subject matter and purpose of the laws:** The *subject* matter and *purpose* of the Civil Aviation Law and the Territory Act is the safety of persons and the management of risks to that safety. The *object* of the Civil Aviation Law is the crew and passengers

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[83] *Occupational Health and Safety Act 1989* (ACT) ss. 37, 38 and 45.
[84] Ibid ss. 44A and 44B.
[85] *Occupational Health and Safety Act 1985* (Vic) s. 27; *Work Health Act 1985* (NT) s. 33
[86] *Occupational Safety and Health Act 1984* (WA) ss. 19 and 21.
[87] CS [38]
[88] At [1.19] – [1.33].
[89] CS [40]

engaged in air operations, together with all other people whose safety is put at risk by those operations. The *object* of the Territory Act is workers and other people whose safety is put at risk by the carrying out of work in a business or undertaking.

93. The subject matter of the Civil Aviation Law is demonstrated by s. 3A CAA which refers to the avoidance of accidents or incidents. "Accident" and "incident" are not defined in the CAA. "Accident" is defined in the cognate *Transport Safety Investigation Act 2003*[90]. An accident occurs when a person dies or suffers serious injury as a result of an occurrence resulting from the operation of an aircraft within the limits of Commonwealth power. "Accident" and "incident" are each defined in Annexes 13 and 19 of the Chicago Convention. An "accident" occurs when the operation of an aircraft directly causes death or serious injury to a person. An "incident" is "an occurrence other than an accident associated with the operation of an aircraft which affects or could affect the safety of operation" where "safety" refers to the state in which "risks associated with aviation activities are reduced and controlled to an acceptable level." The subject matter of the Civil Aviation Law is the reduction and control of risks of death or injury to people.

94. The subject matter and purpose of the *Work Health and Safety (National Uniform Law) Act (NT)* **(Territory Act)** is the safety – in the sense of avoidance of health and safety risks.

95. Any difference in the *object* of the two laws on the same subject with the same purpose does not avoid the inconsistency between them. In any event, in the case of commercial air operations all crew, passengers, and other persons whose safety may be put at risk by work undertaken in the course of the aviation undertaking are the object of the safety regulation of both the Civil Aviation Law and the Territory Act.

96. **The Appellant's Submissions – Grounds 1 and 2:** On enactment of the OHS Act in 1991, the relevant uniform application of the Civil Aviation Law continued unabated. The OHS Act applied only to Commonwealth employment. It could have no effect on the meaning of the Civil Aviation Law outside the field of operation of the OHS Act.

97. Upon the enactment of the OHS Act, it and the Civil Aviation Law were to be read together in order to determine whether there was any relevant inconsistency in their respective operation.[91] The Appellant's case is that on enactment the OHS Act, in the words of Lord Wilberforce, added "an additional layer of legislation on top of the pre-

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[90] s. 3(1) read with s. 11(1)

[91] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 45 per Crennan, Kiefel and Bell JJ.

existing legislation, so that each may operate within its respective field".[92] If that were the Parliament's intention, it was an intention to depart radically from the uniformity of prescription of safety standards for civil aviation which had been the hallmark of Commonwealth's law since no later than 1964 and arguably 1937 or 1920.

98. The Appellant's consideration, seriatum, of the maxim *generalia specialibus non derogant* and implied repeal departs from the majority's reasoning in *Eaton* where their Honours referred to the maxim as but one of many possible aids to interpretation and reasoned that legislative intention is to be extracted from all available indications.[93]

99. For the reasons given at paragraphs 76 to 79 above, the legislative intention of the Commonwealth Parliament on enactment of the OHS Act was to leave the earlier Civil Aviation Law intact: to operate as *the* law regulating the safety of air navigation.[94]

100. The appellant can derive no assistance from the extension of the operation of the OHS Act and the WHS Act to "aircraft". Both laws apply in workplaces physically located on an aircraft as referred to at paragraph 79 above.

101. The submission at AS [33] that the WHS Act's exceptions in respect of national security defence and the Australian Federal Police identify the scope of interaction between the WHS Act general duties and other regulatory schemes[95] is without merit. The exception does not refer to other regulatory schemes, but to specific Commonwealth governmental functions. The exceptions serve to highlight that the scope of the WHS Act is limited to Commonwealth public sector employment and workplaces.

102. The Appellant's reliance upon the national scheme for WHS law seeks to prove too much. The object of the WHS Act extracted at AS [35] does not extend to uniformity. The object of national harmonisation as stated is an object capable of achievement whether or not any other jurisdiction, let alone all jurisdictions, enact mirror laws.[96] The object of facilitating a consistent national approach to work health and safety "in this jurisdiction" is to be read harmoniously with the Maritime Industry Act. Consistency does not require mirror legislation, and does not require that safety legislation be the same across all industries.

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[92] *Associated Minerals Consolidated Limited v Wyong Shire Council* [1975] AC 538 at 553 cited in *Eaton* at [45].
[93] *Eaton* at [46].
[94] Per Lord Wilberforce quoted at *Eaton* [45].
[95] AS [33]
[96] cf AS [36].

103. Further, to read down the WHS Act in favour of the continued uniform operation of the Civil Aviation Law advances the national harmonisation of laws relating to work health and safety by providing for the uniform law governing the safety of civil aviation to apply to air navigation on Australian registered aircraft both within Australia and overseas, foreign aircraft within Australia and in air operations in all States and Territories including Victoria and Western Australia. None of the jurisdictional WHS Acts would apply to aircraft when outside Australia, and it is to be doubted any would or could apply for the benefit of passengers or crew of foreign aircraft when within the jurisdiction.[97]

104. In *R v Morris*[98] the Court of Appeal rejected a submission that there was inconsistency between a State law proscribing the reckless use of a vehicle and Regulation 157 of the CAR which proscribed low flying. The Court decided that Regulation 157 considered in isolation did not evince an intention to cover a postulated field of "low flying aircraft" to the exclusion of State law. Contrary to AS [37], there was no submission to the Queensland Court of Appeal, or on the application for special leave, that the Commonwealth law covered the field of the safety of air navigation and consequently the question considered in detail in *HeliAust* and in the present case was not considered.

105. Nor did the enactment of the *Crimes (Aviation) Act 1991* evince an intention that the Civil Aviation Law should cease to be the uniform law governing the safety of civil aviation in Australia[99]. First, the *Crimes (Aviation) Act* had a uniform operation both within Australia and in respect of aviation with countries outside Australia. Contrary to AS [38] there was no apparent conflict between the Civil Aviation Law's operation as the uniform law governing the safety of civil aviation and the *Crimes (Aviation) Act*. Sections 22 and 22A upon which the Appellant relies penalised reckless endangerment by any person. Sections 20A and 29(3) of the CAA penalised reckless operation by persons with aviation safety responsibilities.

106. Second, s. 50 of the *Crimes (Aviation) Act* was concerned to save the operation of State laws which may have otherwise conflicted with provisions of the *Crimes (Aviation) Act*. It said nothing about the operation of those same State laws if they were to conflict with the Civil Aviation Law.

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[97] If that were their effect they would place Australia in breach of its obligations under the Chicago Convention Annexes 6 and 19 to have a uniform national law and administer it through a single specialist national aviation safety administrator.

[98] [2004] QCA 408.

[99] Cf AS [37] to [40]

107. **The Appellant's Submissions – Ground 3:** Whether or not the plurality below were correct in the formulation of the duties imposed upon Mr Livingston and in having regard to the fact that the Operations Manual included provisions to manage the safety of the embarkation and inflation operations as referenced at AS [46] to [49] is beside the point. For the reasons given at paragraphs 50 to 66 above the Civil Aviation Law comprehensively regulated the safety of the embarkation and inflation operations.

108. Section 28BE of the CAA stands out as a singular provision of the civil aviation law. The Appellant ignores its singular features at AS [50] to [52]. It is not in terms directed at questions of safety. Rather the subject of the duty imposed is "every activity covered by the AOC". That is the flight and operation of aircraft.[100] The standard of duty prescribed is one of a "reasonable degree of care and diligence", however the duty does not operate by reference to any object of that duty.

109. The Court in *HeliAust* was correct to construe s. 28BE(5) as having an operation limited to s. 28BE: that is what the sub-section says.

110. The AOC is at **ABFM 15 – 32**. It authorises the operation of hot air balloons in charter operations for the carriage of passengers and in aerial work operations for aerial advertising and aerial photograph. It is readily to be contemplated that conduct of those operations without a reasonable degree of care and diligence may result in damage to others – for example a trespass to land, or a breach of confidence by low level filming of a private and confidential event. That is conduct which may enliven a breach of duty pursuant to s. 28BE but would have nothing to do with aviation safety. The reasoning of Moore and Stone JJ in *HeliAust* was correct.[101]

111. **The Commonwealth's Additional Submissions - Limited scope of obligations under the Commonwealth law:** The Comonwealth seeks to support the Territory law at CS [39] by pointing to a supposed limited scope of obligations under the Commonwealth law. The submission will be readily rejected: as the history of Robens and its implementation shows, safety may be regulated by *either* detailed comprehensive statutory codes *or* by general duties. The Civil Aviation Law is a most detailed and comprehensive statutory code. When the CAA was enacted in 1988 that detailed and comprehensive code was already in force.

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[100] CAA s. 27(2).
[101] *HeliAust* at [70] – [74].

112. The submission at CS [40] that the Civil Aviation Law does not impose obligations concerning workplace health and safety on the conduct of other parties such as designers, manufacturers and suppliers will be readily rejected. There is no area of regulation more tightly and comprehensively governed by positive law than that concerning the design, manufacture, supply and maintenance of aircraft and aeronautical products.[102]

113. **The subject matter of the laws:** The submission at CS [50] that the Civil Aviation Law and the Territory Act are essentially disparate in character is unsupported by the authorities upon which the Commonwealth relies.[103] As the reasoning in *Metal Trades Industry Association*[104] shows, the reasoning in *Wardley* turned upon the limited scope of the airline pilots' agreement, which did not deal with the equality of opportunity between men and women but was rather "narrowly confined to employment relationships determined in settlement of an industrial dispute".[105] Here, like *Metal Trades Industry Association*, there is no limitation on the purpose of either law: each is concerned with the regulation of safety. Here, like *Metal Trades Industry Association*, the only possible distinction between the laws is the scope or object of their operation. That distinction did not save the State law in *Metal Trades Industry Association* and is no basis to save the Territory law in this case.

114. At CS [19] the Commonwealth relies upon *McWaters v Day*.[106] In that case military law would have left a range of conduct unregulated because its range of operation was restricted by the limited scope of the defence power.[107] *Airlines No. 2* shows that there was no relevant limitation on the Commonwealth's power in the present case and that that power has been exercised. Nor does *Commercial Radio Coffs Harbour Limited v Fuller*[108] assist the Commonwealth. It is a case directly analogous to *Airlines No. 2*: the Commonwealth licensing law did not confer a positive authority to do that which was prohibited by State law.[109] The present is not a licensing case.

115. Nor do the authorities relied on at AS [42] assist. The present case is not concerned with the conferral of governmental power where the powers of one polity are readily

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[102] CASR Parts 21, 11, 23, 25, 26, 29, 31, 32, 33, 35, 39, 42, 66, 145, 147; CAR Parts 4, 4A, 4B, 4C, 4D and Schedules 5, 6, 7, 8 and 9.
[103] CS [50].
[104] *Metal Trades Industry Association v Amalgamated Metal Workers and Shipwrights Union* (1983) 152 CLR 632.
[105] Per Gibbs CJ, Wilson and Dawson JJ at 646. See also Mason, Brennan and Deane JJ at 651 – 652.
[106] (1989) 168 CLR 289.
[107] Per the Court at page 297.8.
[108] (1986) 161 CLR 47.
[109] Per Gibbs CJ and Brennan J at 49 – 50 and per Wilson, Deane and Dawson JJ at 56.

identified as a separate subject matter from the powers of the other, unlike cases concerning Royal Commissions, taxation and compulsory acquisition.[110] Nor is the present case like that referred to by the Court in *Viskauskis v Niland*[111], where the subject matter of a law on consumer protection was so obviously different from the subject matter of a law on racial discrimination as to justify the conclusion of mutual operation.

116. **Remaining Issue:** Queensland's criticism at QS [18] of the decision in *HeliAust* by reference to s. 32 of the CAA is misplaced. Section 9(3) of the CAA confers various additional non-safety related functions on CASA including the administration of the national scheme for compulsory insurance against operators' civil liability. That scheme applies pursuant to the *Civil Aviation (Carriers Liability) Act 1959* (Cth) in respect of interstate and international carriage and carriage with and within the Territories and by force of State laws for intrastate carriage: see *South West Helicopters v Stephenson.*[112] CAA s. 9(3)(b) and (ba) provide for CASA to perform functions conferred by those State laws and s.32 has a continuing operation.

Part VI: The Notice of Contention

117. The Notice of Contention is at CAB 111.

118. **Ground 1 – The Operations Manual Requirements:** Section 28BD(1) of the CAA imposed an obligation on the holder of an AOC to comply with all requirements of the Regulations that apply to the holder. Section 29(1)(a) and (b)(ii) created an offence of an operator operating an aircraft in contravention of s. 28BD.

119. CAR 215 read with 224 had the effects set out at paragraphs 60 to 62 above. By reason of Regulation 224(2)(c) the period of the pilot's command commenced no later than the embarkation to the balloon of the first passenger. That was before the decedent was directed to board the aircraft by the Pilot in Command.[113]

120. If the Territory law would otherwise have operated to require the First Respondent to take any step to address the risks faced by boarding passengers, Regulation 215 required the First Respondent to include procedures and instructions for the taking of that step in the Operations Manual. Further, the Territory law, on that assumption, operated to impose the obligation on the operator as a continuing obligation up to (and past) the point when the incident had occurred. CAR 215 and 224 on the other hand operated so that from the

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[110] Per Mason J in *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211 at 220 – 221.
[111] (1983) 153 CLR 280 at 295.
[112] (2017) 327 FLR 110; [2017] NSWCA 312.
[113] ABFM page 3.1.

embarkation of the first passenger, at the latest, the pilot's command of the aircraft commenced and the operator's capacity to influence or control that command by amendment of the Operations Manual was exhausted.

121. As a result the Territory Law and Civil Aviation Law had a differing and conflicting operation which can be illustrated as follows:

	Territory Law	**Civil Aviation Law**
Operator's duty of diligence	Operator must ensure so far as is reasonably practicable that the health and safety of passengers is not put at risk in the embarkation operation	Operator must include in the Operations Manual all procedures and instructions with respect to the embarkation operation as are necessary to ensure its safe conduct, including but not limited to the information, procedures or instructions on each of the matters specified in CAAP[114]
Applicable mechanisms	Operator under direct responsibility for taking the steps that would have been reasonably practicable to eliminate or minimise the risks during the embarkation operation	Operator must document procedures and instructions, included in the Operations Manual and provide in a controlled document to all operations personnel of the operator and to CASA
Other persons upon whom duty cast	An officer of the operator must exercise due diligence to ensure that the operator complies with its duty[115]	Upon commencement of the operation, the pilot has the command and control of the aircraft. On commencement of the embarkation operation, each member of the operations personnel of the operator, including but not limited to the pilot, was obliged to comply with the instructions contained in the Operations Manual
Criminal responsibility for breach and the elements of the crimes	Operator liable for default of its employees	If the embarkation operation occurred without required procedures or instructions being included in the Operations Manual the operator contravened s. 28BD(1) of the CAA and thereby committed an offence pursuant to s. 29(1) of the CAA. If the required procedures and instructions were included in the

[114] CAR 215(2) and (3), CAO 82.7.
[115] Territory Act s. 27(1).

	Territory Law	Civil Aviation Law
		Operations Manual but not complied with, the operations personnel required to comply with the relevant instruction or procedures committed an offence pursuant to CAR 215(9)
Penalties for Breach	In the case of body corporates maximum penalties of $500,000 to $3,000,000 and in the case of natural persons maximum penalties of $50,000 to $600,000[116]	For the operator which fails to include a required procedure or instruction in the Operations Manual imprisonment for 2 years or a fine of $108,000.[117] For operations personnel who fail to comply with a procedure or instruction included in the Operations Manual 25 penalty units, that is a maximum fine of $5,250
Prosecutor and regulator	The Appellant; and Health and Safety Representatives (HSR)	CDPP and CASA
Other enforcement options	HSR may direct cessation of work[118] HSR may issue provisional improvement notice[119] Appellant may issue improvement, non disturbance or prohibition notices, seek injunctions and accept enforceable undertakings.[120]	Cancellation or suspension of AOC[121] Imposition of conditions on AOC[122] Enforceable voluntary undertaking[123]

122. **Ground 2 - Use of Land to Cause an Aircraft to Take Off:** CAR 92(1)(d) creates an offence for a person to engage in conduct that causes an aircraft to take off from a place which is not suitable for use as an aerodrome for the purposes of the taking off of aircraft if the proposed take off from the place cannot occur in safety.

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[116] Territory Act ss. 31 – 33.
[117] *Crimes Act 1914* (Cth) s. 4B(2) and (3).
[118] Territory Act s. 85
[119] Territory Act s. 90
[120] Territory Act Parts 10 and 11
[121] CAA s28BA (3), Part III Division 3A
[122] CAA s. 28BB
[123] CAA Part III Division 3B

123. The primary physical element of the offence is not the taking off of the aircraft but rather the engaging in conduct which causes an aircraft to take off. The inflation of a hot air balloon to the point where it is supporting its own weight[124] constitutes such conduct.

124. The time at which it is to be assessed whether the use of the place as an aerodrome was suitable and whether the proposed take off from the place could occur in safety is the time at which the inflation of the balloon is undertaken. Consequently the Regulation operates to prohibit the placing of any physical barrier above the surface of the land in proximity to the aircraft if to do so would affect the suitability of the land for take off. As particulars 5(c) and 6(b) of the Charge[125] demonstrate, the Territory law on the other hand would operate to impose upon the operator an obligation to erect a barrier on the land in proximity to the balloon while the conduct that would cause it to take off was being engaged in. An inflated balloon may be caused to take off by the wind, and the offence is one of strict liability. As a result the direct inconsistency between CAR 92(1)(d) and WHS Act s. 19(1) and (2) is not avoided by take off being an element of the offence, contrary to VS [47(3)].

Part VII:

The First Respondent estimates 4.5 hours will be required for the presentation of its oral argument.

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[124] APBM page 2.9.
[125] ABFM page 34.