HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **ALEXANDER MATHEW BRODIE PAGE**
Appellant

and

SYDNEY SEAPLANES PTY LIMITED
TRADING AS SYDNEY SEAPLANES ABN 95 112 379 629
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 To what extent do methods of interpretation permit departure from the plain words of legislative provisions unambiguously conferring substantive rights under the guise of statutory context?

Part III: Section 78B of the *Judiciary Act 1903*

3 No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

4 This is an appeal from part of the decision of the Court of Appeal of the Supreme Court of New South Wales in *Sydney Seaplanes Pty Limited v Page* (2021) 393 ALR 485; [2021] NSWCA 204 (**CA**), upholding an appeal from the judgment in *Page v Sydney Seaplanes Pty Limited t/as Sydney Seaplanes* [2020] NSWSC 1502 (**TJ**).

Part V: Facts

5 On 31 December 2017, Ms Heather Bowden-Page died in a seaplane accident in the course of a flight between Cottage Point and Rose Bay, both in New South Wales. The flight was operated by the respondent (**Sydney Seaplanes**) {CA [7]; CAB 59}.

6 On 18 December 2019, Ms Page's father, the appellant (**Mr Page**), commenced proceedings in the Federal Court of Australia (**Federal Court Proceeding**) {CA [8]; CAB 59}.[1] Mr Page or his legal advisers made a mistake in commencing proceedings in the Federal Court, as that court had no jurisdiction to entertain the claim because the flight occurred wholly within New South Wales {CA [12]; CAB 60-61}.

7 On 24 April 2020, Griffiths J dismissed the amended originating application on the basis of a want of jurisdiction: *Page v Sydney Seaplanes Pty Limited* (2020) 277 FCR 658 {CA [12]; CAB 60-61}. That date is significant because it is more than two years after the date of the accident, meaning that Mr Page could not commence fresh proceedings in the Supreme Court of New South Wales due to the operation of section 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (***Commonwealth Carriers' Liability Act***) as incorporated into the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) by sections 5 of that act {CA [14]; CAB 61}.

8 On 11 May 2020, Mr Page filed a summons in the Supreme Court of New South Wales seeking orders that the Federal Court Proceedings be treated as a proceeding in the Supreme Court pursuant to section 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) (***State Jurisdiction Act***), and that the Federal Court Proceeding be deemed to have been brought in the Supreme Court on 23 December 2019 {CA [15]; CAB 61-62}.[2] The effect of the order would be to enable Mr Page to pursue his claim against Sydney Seaplanes. Without the order, Mr Page's claim would be statute barred.

9 The primary judge granted the relief sought. Sydney Seaplanes appealed, arguing that the order of Griffiths J was not a "relevant order" within the meaning of the *State Jurisdiction Act*, that section 34 of the *Commonwealth Carriers' Liability Act* was not a "limitation law" within the meaning of section 11(1) of the *State Jurisdiction Act*, and that section 11(3)(b) of the *State Jurisdiction Act* is inconsistent with section 34 of the *Commonwealth Carriers' Liability Act* {CA [22]; CAB 63-64}. The Court of Appeal allowed the appeal on the basis of the first of these arguments.

Part VI: Argument

10 The applicable principles are well established: it is not suggested that enacted text is to be read in any way other than contextually and purposively, or that the Court of Appeal

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[1] The reference to 23 December 2019 at CA [152] appears to be an error. The electronic cover sheet to the originating application bears a date of 23 December 2019, but indicates the document was lodged electronically and accepted for filing on 18 December 2019. In any case, nothing turns on the difference.

[2] It is unclear why the date sought was 23 December 2019 rather than 18 December 2019, but nothing turns on it.

misstated the authorities, misconstrued the principles or otherwise misdirected itself as to that orthodoxy.

11 The error was one of application and, more particularly, the assumption – or implication – of not only a specific but also a particularly narrow statutory purpose to limit and, in this case, eliminate what would otherwise be a clear conferral of a discretionary remedial power to the Supreme Court of New South Wales, with the stark and unfortunate result of leaving Mr Page without a remedy (at least against the primary alleged wrongdoer). That error is concisely demonstrated by the conclusion reached by Bell P: "the want of jurisdiction being referred to is not any general want of jurisdiction but rather a want of jurisdiction by reason of a constitutionally invalid conferral of jurisdiction of the kind addressed in *Wakim*" {CA [53]; CAB 73-74; to the same effect: [111] and [146]; CAB 92 and 105 (Leeming JA), [168]; CAB 112 (Emmett JA)}.

12 For the following reasons, the text and context of the *State Jurisdiction Act* do not support the conclusion reached by the Court of Appeal.

13 *First*, there is no doubt that the order of Griffiths J meets the textual meaning of the words "an order of a federal court … dismissing … a proceeding relating to a State matter for want of jurisdiction", being paragraph (a) of the definition of "relevant order" {*State Jurisdiction Act s 11*}. So much was accepted by Bell P {CA [25]; CAB 64}.

14 The clarity and absence of any fetter with which the enacted text defines "relevant order" is significant for a number of reasons. Chief among them is the proposition that a court must be slow to create or imply, under the guise of interpretation, a purpose or limit to the provision so as to alter the will of Parliament embodied in the enacted text {see *H Lundbeck A/S v Sandoz Pty Ltd* [2022] HCA 4 at [97] (Edelman J)}. This proposition is all the more significant in conferrals of jurisdiction {see, eg, *Knight v FP Special Assets Limited* (1992) 174 CLR 178 at 205 (Gaudron J); *PMT Partners Pty Limited (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 (Brennan CJ, Gaudron and McHugh JJ)}, and of "fundamental importance" in circumstances where the provision is definitional in nature {see, eg, *PMT Partners Pty Limited (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310 (Brennan CJ, Gaudron and McHugh JJ)}. Such provisions enact limits to (thereby defining the scope of) substantive provisions and, as such, altering the textual meaning of that provision will necessarily have significant consequences on the *entire* enacted text.

15 *Second*, the Court of Appeal was unduly restrictive in holding that the context and purpose of the statute was limited to the specific and particularly narrow purpose of addressing the consequences of *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (***Wakim***) {CA [46]; CAB 71}.

16 Acceptance of the proposition that the *State Jurisdiction Act* was squarely and urgently directed to addressing the consequences of *Wakim* does not mean that the unambiguous enacted text is to be read as being directed *solely* to the consequences of *Wakim* or that it be directed solely to the *immediate* consequences of *Wakim*. There is nothing in the enacted text or the extrinsic materials that provide for such a narrow purpose and, in contrast, the words of the enacted text point in the opposite direction. If the statute was *solely* for the specific and narrow purpose of addressing the immediate consequences of *Wakim*, the definition of "relevant order" would be limited, at least temporally, to proceedings past or pending at the time the legislation came into force. The fact that the definition had no such requirement is a powerful textual indicator telling against such an assumption or implication.

17 The express contemplation of orders made after (without limitation) the commencement of the section ("whether made before or after the commencement of this section") is further textual support for the proposition that the purpose of the *State Jurisdiction Act* was not intended to be so narrow. So too is the inclusion of legislation enacted after – and some many years after – *Wakim* in the definition of "relevant State Act", as well as the ability (again not limited in time) to prescribe further legislation as a "relevant State Act".

18 The first and fourth limbs of the definition of "State matter" also demonstrate the point. On any view, those limbs of the definition were not matters thrown up or rendered concrete by any of the constitutional argumentation which had produced the perceived national emergency to be addressed by remedial legislation.

19 *Third*, insofar as there is any perceived paramountcy in addressing *Wakim* or its immediate consequences, the fact that the legislative response went further than remedying the immediate mischief resulting from *Wakim* is unexceptional. In fact, contrary to the Court of Appeal's reasoning, the interpretation propounded by the appellant rather supports the legislative purpose of addressing the consequences of *Wakim*.

20 There is no doubt that the cross-vesting scheme was intended to reduce the time and cost associated with addressing the occasionally complex and arcane matters of

jurisdiction. The immediate consequence of *Wakim* was that past and pending proceedings in federal courts would be invalid for want of jurisdiction. That consequence was urgently addressed by the *State Jurisdiction Act*. That immediate issue was not, however, the *only* consequence of Wakim. Another consequence was that the thorny question of whether a court has jurisdiction (including whether a proceeding falls within federal jurisdiction) would remain. That meant that, as was the case here, litigants could suffer should they or their advisers be unable to discern the correct forum within which to sue. This consequence is also addressed by the *State Jurisdiction Act*, but *only* if the narrow purpose read into the statute by the Court of Appeal is rejected.

10 **21** The above analysis also answers the reliance placed on the long title to the *State Jurisdiction Act* {CA [44]; CAB 70}. The construction propounded by the appellant is equally one which relates "to the ineffective conferral of jurisdiction on the Federal Court of Australia and the Family Court of Australia with respect to certain matters". Were it not for the conferral of jurisdiction held to be ineffective in *Wakim*, Griffiths J would not have dismissed the Federal Court Proceedings.

22 *Fourth*, the hurdles raised by the Court of Appeal do not support the conclusions reached below.

23 The potential breadth of the operation of the *State Jurisdiction Act* {CA [139], [141], [142]; CAB 104} is of limited consequence. It is true that the *State Jurisdiction Act* has
20 the effect of "extending indefinitely into the future for litigants who misguidedly take the serious step of commencing proceedings in the Federal Court of Australia without first considering the issue of jurisdiction" {CA [142]; CAB 104}. But the unambiguous words of the statute – and, for the reasons outlined above, the mischief prompting its enactment – require such a conclusion. That is not to say there are no protections {cf CA [139]; CAB 103}: section 11(2) makes clear the Supreme Court *may*, not *must*, make the order treating the proceeding as one in the Supreme Court.

24 It is a matter for the legislature to extend savings provisions in relation to the incorrect commencement of proceedings due to the absence of jurisdiction indefinitely into the future. Judicial impression of the remarkable extent of any such intended statutory
30 amelioration of such litigants' position should not be regarded as a means by which a significant limiting and unexpressed purpose should be attributed to the legislation.

25 The Court of Appeal's reasoning from the nature of the *State Jurisdiction Act* as a "stopgap measure" to the proposition that there is "nothing to suggest its purpose extended

to proceedings commenced two decades after *Re Wakim* was delivered" {CA [139]} is wrong. In particular, there is no ground to regard these provisions as a dead letter. Leaving aside the textual indicators outlined above that such an extended purpose did exist, the proposition goes both ways: there is equally nothing to suggest the purpose of the statute extends *only* to proceedings commenced before or shortly after *Wakim*. Indeed, such reasoning immediately begs the question: how long after *Wakim*? The law ought not contemplate such indeterminacy.

26 *Fifth*, the presumption or inference based on the common experience of legislative acts should not be forgotten: "when Parliament uses words with a common or ordinary meaning then the words are intended to bear that ordinary meaning" due in part to the "goal of parliamentary drafting for clarity and familiarity in order to ensure the transparency and intelligibility of statute law" {*Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 381 ALR 601; [2020] HCA 29 at [95] (Edelman J)}. Here, it was an error to imply a specific and narrow purpose to depart from the words of that text so as to read it as if it contained additional words of limitation.

Sydney Seaplanes' notice of contention

27 Sydney Seaplanes has filed a notice of contention but has not yet filed submissions in support of it. Accordingly, Mr Page will respond to those submissions in reply.

Part VII: Orders sought

28 Appeal allowed.

29 Set aside orders 1, 2, 3 and 4 of the Court of Appeal, and order in their place:

(a) The appeal from the orders made by Adamson J on 28 October 2020 be dismissed.

(b) The respondent to pay the appellant's costs of the proceedings, including the hearing before Adamson J, the Court of Appeal and this appeal.

Part VIII: Time estimate

30 It is estimated that up to 1.5 hours will be required for presentation of the appellant's oral argument in chief.

Dated: 25 May 2022

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Appellant

and

10 **SYDNEY SEAPLANES PTY LIMITED**
TRADING AS SYDNEY SEAPLANES ABN 95 112 379 629
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments to which reference is made in these submissions.

20

No.	Description	Version	Provisions
1	*Civil Aviation (Carriers' Liability) Act 1959* (Cth)	Compilation No. 29 (21 October 2016 to 16 June 2021)	Section 34
2	*Civil Aviation (Carriers' Liability) Act 1967* (NSW)	Current Compilation (1 December 1996 to date)	Section 5
3	*Federal Courts (State Jurisdiction) Act 1999* (NSW)	Current Compilation (1 July 2013 to date)	Long title, sections 3, 4, 11,