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

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of the issue or issues

2. The primary issue is whether the Court of Appeal erred in its conclusion that the order dismissing the Federal Court of Australia (**Federal Court**) proceedings for want of jurisdiction was not a "*relevant order*" for the purposes of section 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) (***State Jurisdiction Act***) (*Sydney Seaplanes Pty Limited v Page* (2021) 393 ALR 485; [2021] NSWCA 204 (**CA**) [53] per Bell CJ; Leeming JA agreeing at [147]; Emmett AJA agreeing at [169]).
3. Should this Court decide that the Court of Appeal was correct in its conclusion, the appeal must be dismissed.
4. Should this Court decide that the Court of Appeal did err in its conclusion, the notice of contention filed by the respondent on 4 May 2022 raises two further issues.
5. *First*, whether section 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (***Commonwealth Carriers' Liability Act***), operating as State law (by section 5 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) (***State Carriers' Liability Act***), is inconsistent with sections 11(2) and/or 11(3)(b) of the *State Jurisdiction Act*.
6. *Second*, if the answer to the first question is yes, whether the effect of section 6A of the *State Carriers' Liability Act* is that section 34 of the *Commonwealth Carriers' Liability Act* (applying as a law of New South Wales) should prevail over sections 11(2) and/or 11(3)(b) of the *State Jurisdiction Act*.

7. If this Court finds that there is an inconsistency between section 34 of the *Commonwealth Carriers' Liability Act* and sections 11(2) and/or 11(3)(b) of the *State Jurisdiction Act*, and that the effect of section 6A of the *State Carriers' Liability Act* is that section 34 should prevail over sections 11(2) and/or 11(3)(b), then the appeal must be dismissed.

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

8. The respondent does not consider that any notice is required to be given in compliance with section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Material facts

9. There are no material facts set out in the appellant's narrative of facts or chronology that are contested by the respondent.

Part V: Argument

10. The appellant accepts that the Court of Appeal correctly stated the applicable principles of statutory construction: Appellant's Submissions (**AS**) [10]. Although the appellant advances what is said to be five arguments in support of his appeal, his principal argument appears to be that the Court of Appeal erred in its conclusion that the legislative purpose behind the *State Jurisdiction Act* was confined to addressing the consequences of the decision of this Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (***Wakim***). The Court of Appeal concluded that the "*want of jurisdiction*" referred to in the definition of "*relevant order*" 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] per Bell CJ.

11. The short answer to that argument is that it should be rejected for the reasons stated by Bell CJ and Leeming JA. Bell CJ reasoned that the provisions of the *State Jurisdiction Act* together with broader considerations of context and the extrinsic materials "*shed a particularly clear light on the relevant statutory purpose*": CA [58] per Bell CJ. That reasoning included the following elements:

    (a) section 1(2) of the *State Jurisdiction Act*, which provides that "*The purpose of this Act is to provide that certain decisions of the Federal Court of Australia or the Family Court of Australia have effect as decisions of the Supreme Court and to make other provision relating to certain matters relating to the jurisdiction of those courts*": CA [43];

    (b) the long title, being "*[a]n Act relating to the ineffective conferral of jurisdiction on the Federal Court and the Family Court of Australia with respect to certain matters*": CA [44]. His Honour found that this reference in

the long title plainly was a reference to this Court's decision in *Wakim:* CA [45];

(c) the opening sentence of the majority judgment in this Court's decision in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 (***Residual Assco***) – that the (South Australian) Act was introduced to address the effects of the decision in *Wakim*: CA [47];

(d) the reference in section 4(1) in the definition of "*ineffective judgment*", focusing as it does on judgments given before the commencement of this section in the purported exercise of jurisdiction "*purporting to have been conferred"* on the Federal Court by a "*relevant State Act*": CA [48];

(e) the structure of the *State Jurisdiction Act* considered as a whole, namely that sections 6 to 10 were directed to ineffective judgments, while section 11 was directed to pending proceedings: CA [49];

(f) the explanatory memorandum of the *State Jurisdiction Act* which focused on the invalid conferral of jurisdiction on the Federal Court and Family Court of Australia, along with the fact that the *Federal Courts (State Jurisdiction) Bill 1999* was introduced within a week of the decision in *Wakim*: CA [50]; and

(g) the second reading speech, which was to similar effect: CA [51].

12. This reasoning is compelling and should be accepted. The attack on that reasoning by the appellant, much of which was not advanced either to the primary judge or to the Court of Appeal, should be rejected, for the reasons below.

Appellant's first argument (AS [13]-[14])

13. The respondent accepts that the order of Griffiths J fell within the literal meaning of the definition of "*relevant order*" in the *State Jurisdiction Act*. However, a departure from the literal or grammatical meaning of words is warranted when the words do not conform to the legislative intent as ascertained from the provisions of the statute and other settled techniques of purposive construction: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [78]. This is consistent with what this Court said in the decision in *SZTAL v Minister for Immigration* (2017) 262 CLR 362 [14], that if the ordinary meaning of the words is not consistent with the statutory purpose, that meaning must be rejected: see also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.

14. The authorities relied on by the appellant in support of the proposition that "*a court must be slow to create or imply, under the guise of interpretation, a purpose or limit to the provision to the provision so as to alter the will of Parliament embodied in the*

enacted text" (AS [14]) do not advance his case. None of the authorities cited suggest that where the natural and ordinary meaning of the words are inconsistent with the purpose of legislation, "*limitations and qualifications*" cannot be read into a statutory definition.[1]

15. If the Court of Appeal was correct to conclude that the statutory purpose was limited to addressing the consequences of the decision in *Wakim*, there is nothing in the appellant's first argument to undermine the Court of Appeal's construction.

Appellant's second argument (AS [15]-[18])

16. The appellant contends that 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 immediate consequences of *Wakim*: AS [16]. The appellant further contends that there is nothing in the enacted text or the extrinsic materials that provide for such a narrow purpose and, in contrast, the words point in the opposite direction: AS [16]. Specifically, the appellant contends that, were that so, the definition of "*relevant order*" would be limited: AS [16].

17. Each of the appellant's contentions should be rejected, for the following reasons.

18. *First*, the reasoning of Bell CJ and Leeming JA support a conclusion that the *State Jurisdiction Act* was directed solely to the consequences of the decision in *Wakim.*

19. *Second*, it is hardly uncommon for general words in a statute to be limited by their context in the absence of textual limits: see, for example, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; CA [57] per Bell CJ. Further, Justice Leeming addressed this point at CA [112], [113], [141] and [145].

20. *Third*, sections 4(1) and (2) of each State's *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) remained in force until November 2000: CA [111]. In that way, as Justice Leeming said at [113], a proceeding with no Federal element commenced in the Federal Court in say September 1999, that is, after this Court's decision in *Wakim*, but before section 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) had been repealed may have been seen as a proceeding relating to a State matter as defined: CA [114]. That led to his Honour's conclusion at [145], that section 11 is confined to proceedings commenced at a time when the *Jurisdiction of Courts (Cross-*

[1] *PMT Partners Pty Limited (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310 and 313 (Brennan CJ, Gaudron and McHugh JJ). See also *Knight v FP Special Assets Limited* (1992) 174 CLR 178 at 205 (Gaudron J).

vesting) Act 1987 (NSW) purported to confer jurisdiction in State matters on the Federal Court. That analysis by Leeming JA surely is correct.

21. *Fourth*, contrary to the contentions of the appellant in this Court (but not advanced below), the definition of "*relevant State Act*" is not an indicator of any broader purpose of section 11 of the *State Jurisdiction Act* than that found by the Court of Appeal. All of the legislation included in the definition, subject to some presently irrelevant exceptions such as the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), contemplate the application of Commonwealth laws as laws of New South Wales, and obviously enough, were included in the definition for that reason. The Acts listed are Acts which apply Commonwealth administrative laws. The inclusion of each of these Acts is logical, given the purpose of the *State Jurisdiction Act* was in part to address the possibility of the further exercise of the jurisdiction found to be invalid in *Wakim*.[2]

22. Further, in answer to the appellant's reliance on the inclusion of Acts in the definition of "*relevant State Act*", which post-date the decision in *Wakim*, those Acts each include a provision inserting the name of the Act into the *State Jurisdiction Act*, and in the Explanatory Memorandum to each respective bill, an explanation is given in similar terms to the following: "*the amendment will enable regulations to be made under section 16(2) of [the State Jurisdiction Act] to make modifications to the administration and enforcement of the applied Commonwealth laws as a consequence of any future decisions of the High Court with respect to the conferral of functions on Commonwealth officials in connection with co-operative Commonwealth/State legislative arrangements.*"[3]

23. The inclusion of this subsequent legislation in the definition of "*relevant State Act*" plainly was designed to ensure that the jurisdictional issue identified in *Wakim* did not occur in the context of these Acts.

24. *Fifth*, contrary to AS [18], the first and fourth limbs of the definition of "*State matter*" were indeed matters "*thrown up*" or "*rendered concrete*" by *Wakim*. The text of the

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[2] See, for example, New South Wales, *Second Reading Speech*, Legislative Council, 1 July 1999, 1813 (Attorney General, and Minister for Industrial Relations, the Hon J W Shaw) ("*The effect of the court's decisions is to invalidate decisions previously made by the Federal Court and the Family Court relying purely on cross-vesting arrangements and to prevent the further exercise of such jurisdiction by those Federal courts.*").

[3] Explanatory Memorandum, *Gene Technology (New South Wales) Act 2003* (NSW), available at < Ex note Gene Technology (New South Wales) Bill 2003.pdf (nsw.gov.au)>; Explanatory Memorandum, *Research Involving Human Embryos (New South Wales) Act 2003* (NSW), available at < Ex note Research Involving Human Embryos (New South Wales) Bill 2003.pdf (nsw.gov.au)>; Explanatory Memorandum, *Water Efficiency Labelling and Standards (New South Wales) Act 2005* (NSW), available at < Ex note Water Efficiency Labelling and Standards (New South Wales) Bill 2005.pdf (nsw.gov.au)>.

first limb (and the second) follows the definition of "*State matter*" in each State's *Jurisdiction of Courts (Cross-vesting) Act*. Plainly, the legislative purpose of including those limbs was to address the constitutional invalidity of those provisions as a result of *Wakim*: see also CA [104]-[106] per Leeming JA.

25. The fourth limb of the definition of "*relevant State Act*" concerns matters arising under or in respect of an "*applied administrative law*".[4] In addition to a "*relevant State Act*" that purports to confer jurisdiction on a federal court, the application of Commonwealth administrative laws as State laws within the applied law schemes the subject of the definition of "*relevant State Act*", gave rise to purported conferrals of jurisdiction on a federal court, hence the need to include the fourth limb in the definition of "*State matter*".

26. This may be illustrated by two examples:

    (a) Section 44 of the AAT Act provides for appeals from Australian Administrative Tribunal (**AAT**) decisions to the Federal Court on questions of law. Section 45 provides for references by the AAT of questions of law to the Federal Court. When those provisions were purportedly adopted by the States as State laws, through applied administrative law provisions (such as section 16(1) of the *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (Cth)), they purported to confer the relevant jurisdiction on the Federal Court in respect of State matters.

    (b) Further, the purported adoption by States of the ADJR Act, through applied administrative law provisions, resulted in the review of State matters arising under State legislation in the Federal Court, was rendered invalid following the decision in *Wakim*.

27. These problems were articulated by the then Senator Nick Bolkus in the Second Reading Speech of the *Jurisdiction of Courts Legislation Amendment Bill 2000* (Cth):[5]

> *To further demonstrate the inconveniences arising from [the decision in Wakim] ... Firstly, the Administrative Appeals Tribunal … has operated so effectively that some states have legislated to adopt the provisions of the Administrative Appeals Tribunal Act as state law. This meant that the tribunal has been able to review decisions taken by state public officers and those*

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[4] This includes the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), the *Administrative Decisions (Judicial Review) Act) 1977* (Cth) (**ADJR Act**), the *Freedom of Information Act 1982* (Cth), the *Ombudsman Act 1976* (Cth), the *Privacy Act 1988* (Cth) or any of the regulations in force under any of those Acts

[5] Commonwealth, *Second Reading Speech*, The Senate, Thursday 13 April 2000, 14093 (Sentaor Nick Bolkus), available at <hansard_frag.pdf;fileType=application/pdf (aph.gov.au)>.

decisions have been appealable to the Federal Court. Because of the Wakim case—a case which held that states could not confer jurisdiction on Commonwealth judicial bodies—those cooperative schemes that have been implemented will now have to be amended.

There is also the area in respect of the Administrative Decisions (Judicial Review) Act 1977 … At present, cooperative schemes between the federal and state governments can prescribe that the AD(JR) Act applies to decisions of the Commonwealth officers as a matter of state law. These schemes will also now have to be amended in light of re Wakim.

10 28. The consequences of the decision in *Wakim* in respect of applied administrative laws were addressed in large part by the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth).[6] The amendments to the AAT Act contained in the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) made certain that the Federal Court has jurisdiction to deal with AAT matters by virtue of the AAT Act applying as Commonwealth law, even where the AAT itself is acting pursuant to powers conferred by a State or Territory.[7] Further, the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) restored the pre-*Wakim* system of judicial review, as it applied to Commonwealth officers and authorities performing functions under State law, but as Federal, rather than State jurisdiction.[8]

20 29. Later amendments to applied administrative law provisions in the *Marine Safety Act 1998* (NSW) and the *Poisons and Therapeutic Goods Act 1966* (NSW) including the insertion of provisions to the effect that "*Any provision of a Commonwealth administrative law applying because of this section that purports to confer jurisdiction on a federal court is taken not to have that effect*", were made as a direct response to the decision in *Wakim*, although later in time.[9]

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[6] See Explanatory Memorandum, *Jurisdiction of Courts Legislation Amendment Bill* (Cth), page 2, available at < Microsoft Word - 29878[1].docx (aph.gov.au)>.
[7] *Ibid*. at page 3.
[8] Provisions complementary to the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) were enacted in New South Wales via the *Federal Courts (Consequential Provisions) Act 2000* (NSW). This Act amended the *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW), the *Competition Policy Reform (New South Wales) Act 1995* (NSW), the *Corporations (New South Wales) Act 1990* (NSW), the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), the *National Crime Authority (State Provisions) Act 1984* (NSW) and the *Price Exploitation Code (New South Wales Act 1999* (NSW) including by, in effect, excluding the right of appeal to the Federal Court contained in the AAT Act and by removing from the subject state acts any provision that purports or purported to apply the ADJR Act as a law of the State.
[9] The Explanatory Memorandum to the *Marine Safety Amendment (Domestic Commercial Vessel National Law Application)* Bill 2012 (NSW) which inserted section 9K(4) into the *Marine Safety Act 1998* (NSW) indicates that the section "*… is consistent with the High Court decision in Wakim's case (Re Wakim; Ex parte McNally (1999) 198 CLR 511) that a State law cannot confer jurisdiction on the Federal Court*." Similarly, the Explanatory Memorandum to the *Health Legislation Bill 1999* (NSW) which inserted section 33E(4) into

30. Contrary to the appellant's contentions, the remedial provisions discussed above were limited to addressing the consequences of this Court's decision in *Wakim*. Indeed, the matters relied on by the appellant provide further support for the construction of the Court of Appeal.

31. Further, the construction of section 11 of the *State Jurisdiction Act* does not turn on applying a narrow construction merely because the provision creates a statutory fiction. As stated in *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696 "*it becomes very important to consider the purpose for which the statutory fiction is introduced.*": CA [97] per Leeming JA. The same would be true in respect of a broad construction: CA [97] per Leeming JA.

Appellant's third argument (AS [19]-[21])

32. The appellant contends in AS [20] that "*another consequence*" of the decision in *Wakim* was that "*the thorny question of whether a court has jurisdiction…would remain*". If by that submission the appellant is contending that the absence of jurisdiction found by Griffiths J in the present case had any connection to the decision in *Wakim*, that contention should be rejected. The jurisdictional question the subject of the decision in *Wakim* was limited to the purported conferral of jurisdiction in State matters on the Federal Court or the Family Court of Australia. Consistent with this, there is nothing in the *State Jurisdiction Act* or in any relevant extrinsic material which suggests that the *State Jurisdiction Act* addresses any broader jurisdictional issues.

33. The contention that, were it not for the conferral of jurisdiction held to be ineffective in *Wakim*, Griffiths J would not have dismissed the Federal Court proceedings (AS [21]) should also be rejected. The order made by Griffiths J dismissing the Federal Court proceedings had nothing to do with the conferral of jurisdiction held to be ineffective in the decision in *Wakim*. To the contrary, the basis for Griffiths J's finding was that "*any purported federal claim raised in the amended statement of claim is entirely misconceived for the simple reason that the rights and liabilities created by [the Commonwealth Carriers' Liability Act] do not apply to an intra-state flight.*"[10] That is, the Federal Court never had or never purported to have jurisdiction in respect of the claim for damages sought in the Federal Court.

34. The suggestion that the construction propounded by the appellant is equally one which relates "*to the ineffective conferral of jurisdiction on the Federal Court of Australia*

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the *Poisons and Therapeutic Goods Act 1996* (NSW) indicates that the amendment is "*consequent on the High Court decision regarding the vesting of State jurisdiction in federal courts.*"

[10] *Page v Sydney Seaplanes Pty Ltd* [2020] FCA 537 [32].

and the Family Court of Australia with respect to certain matters" (AS [21]) does not assist the appellant in circumstances in which, in this case, there never was a purported conferral of jurisdiction on the Federal Court.

Appellant's fourth and fifth arguments (AS [22]-[26])

35. The appellant's fourth and fifth arguments are in truth mere extensions of his first argument.

36. The appellant accepts that on his construction, the *State Jurisdiction Act* has 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] per Leeming JA) but contends that the "*mischief prompting its enactment*", amongst other things, requires such a conclusion: AS [23]. This contention should be rejected. For the reasons above, the mischief prompting the *State Jurisdiction Act* is much narrower than is asserted by the appellant: CA [52] per Bell CJ.

37. The question of "*how long after Wakim?*" (AS [25]) is answered by reference to proceedings commenced at a time when the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) purported to confer jurisdiction in State matters on the Federal Court: CA [113] per Leeming JA, remembering that the *State Jurisdiction Act* was only ever intended to be an interim measure.[11]

38. Further, to extend the safety net established by the *State Jurisdiction Act* "*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] per Leeming JA) would give rise to capricious outcomes.

Part VI: Argument on the respondent's notice of contention

39. Before the primary judge and on appeal the respondent contended that, if the appellant's construction of "*relevant order*" was accepted, section 11(2) and/or 11(3)(b) of the *State Jurisdiction Act* were inconsistent with section 34 of the *Commonwealth Carriers' Liability Act*, and that section 34 should prevail over section 11(2) and/or (3)(b).

40. The primary judge rejected that argument: *Page v Sydney Seaplanes Pty Ltd (t/as Sydney Seaplanes* [2020] NSWSC 1502 [81]. In the Court of Appeal, Bell CJ briefly considered the argument, and found that the issue "*does not admit of an easy answer*"

[11] See, for example, New South Wales, *Second Reading Speech*, Legislative Council, 1 July 1999, 1815 (Attorney General, and Minister for Industrial Relations, the Hon. J. W. Shaw) ("*This is only a temporary measure*.").

(CA [79]), but that on balance there was no inconsistency. The other members of the Court did not decide this point: CA [149] per Leeming JA; [169] per Emmett AJA.

41. The respondent's inconsistency argument turns on (1) a proper understanding of the purpose of section 34 of the *Commonwealth Carriers' Liability Act*; (2) whether section 34 is inconsistent with section 11(2) and/or (3)(b) of the *State Jurisdiction Act* (in the event that "*relevant order*" is construed as the appellant contends); and (3) if so, whether section 34 prevails over section 11(2) and/or (3)(b).

The purpose of section 34 of the Commonwealth Carriers' Liability Act

42. Section 34 of the *Commonwealth Carriers' Liability Act* relevantly provides that "*the right of a person to damages under this Part is extinguished if an action is not brought by him or her or for his or her benefit within two years [of the date on which the aircraft ought to have arrived at its destination]…*". Section 34 is found in Part IV of that Act. Section 27 of the *Commonwealth Carriers' Liability Act* relevantly provides that Part IV only applies to interstate carriage or carriage within a territory, or between a territory and a place outside that territory, or international carriage to which the international conventions do not apply. That is, Part IV of the *Commonwealth Carriers' Liability Act* has no direct application to intra-state carriage of the kind under consideration in this case.

43. The appellant's only source of rights is or was pursuant to the *State Carriers' Liability Act*, which by section 4, applies to intra-state carriage within New South Wales. The relevant provisions in Part IV of the *Commonwealth Carriers' Liability Act* apply to the appellant's claim under the *State Carriers' Liability Act* because section 5 of the *State Carriers' Liability Act* relevantly provides that the provisions in Parts IV and IVA of the Commonwealth Carriers' Liability Act apply as if those provisions were incorporated in the *State Carriers' Liability Act*. Section 34 of the *Commonwealth Carriers' Liability Act* is one of the provisions incorporated into the *State Carriers' Liability Act:* section 5 of the *State Carriers' Liability Act*.

44. That is, by section 34 of the *Commonwealth Carriers' Liability Act* operating as State law, the appellant's cause of action was extinguished unless it was brought within two years of the date on which the aircraft ought to have arrived at its destination.

45. This Court analysed the nature of section 34 in *Agtrack Pty Limited v Hatfield* (2005) 223 CLR 251. The plurality held (at [54]) that section 34 should be given a construction which is harmonious with Article 29 of the *Warsaw Convention*. In addressing the international authorities construing Article 29, the plurality referred with approval to authorities describing Article 29 as being a "*condition precedent*" to suit. The plurality

also cited with approval (at [49]) the authors of *Shawcross and Beaumont, Air Law*, with respect to Article 29, who said this: "*If the right of action is 'extinguished', it would seem that it is completely destroyed and not merely rendered unenforceable by action*." The plurality said (at [51]) that there was a strong body of authority which held that Article 29 imposed a condition "*which is of the essence of the right to damages rather than providing for no more than a bar to the enforcement of an existing right*".

46. The plurality also referred with approval to the decision of the South Australian Full Court in *Timeny v British Airways Plc* (1991) 56 SASR 287 (***Timeny***). In *Timeny*, Bollen J (at 297), with whom the remaining members of the Court agreed, said this: … "*The two-year period is not a mere period of limitation operating at its expiration to bar a remedy. It is an integral part of a right. Some courts have regarded it as a condition precedent to the exercise of the right. That is to say, the bringing of proceedings within the stated time is a condition precedent to the exercise of the right or of the obtaining of its benefit…*"

47. Accordingly, the effect of section 34 of the *Commonwealth Carriers' Liability Act* is that, unless proceedings are brought within the two-year period, the cause of action (in this case under *State Carriers' Liability Act*) is destroyed forever.

48. Further, the adoption of section 34 in the *Commonwealth Carriers' Liability Act* by the Federal Parliament plainly was intended to achieve consistency with the extinguishment regime in the Warsaw Convention. In *Parkes Shire Council v South West Helicopters Pty Ltd* [2019] HCA 14, Kiefel CJ, Bell, Keane and Edelman JJ said this (at [36]):

> *The 'cardinal purpose' of the [Commonwealth Carriers' Liability Act] in giving effect to the [Warsaw] Convention was to achieve uniformity in the law relating to liability air carriers, so that, in those areas with which the [Warsaw] convention deals, it contemplates a uniform code that excludes resort to domestic law.*

49. Gordon J (at [54]) referred to the cardinal purpose of the regime as being to achieve "*uniformity of rules governing claims*" and responding "*to the prospect of a 'jungle-like chaos*'" of different regimes. Her Honour also referred to the rules as being intended to "*be exclusive also of any resort to rules of domestic law*".

Whether section 34 is inconsistent with section 11(2) and 11(3)

50. At this point, it is relevant to turn attention to the *State Jurisdiction Act*. The effect of the decision of this Court in *Residual Assco* is that section 11 does not "*revive*" proceedings which have been dismissed for a want of jurisdiction in the Federal Court. In *Residual Assco*, the Court found (at [25]) that the proceeding in the Supreme Court

is a "… *proceeding linked to, but operating independently of, the federal court proceeding*". The Court found that an order under section 11(2) *does not* operate in effect as a transfer. At [27], the Court held that the proceeding commenced in the Supreme Court was a new proceeding.

51. The primary judge addressed the respondent's inconsistency argument at [72]-[81] of the judgment. With respect, the respondent contends that the primary judge fell into error in the following respects.

52. The primary judge's references (at [73]-[75]) to Article 29 are not directly relevant. Whilst it is settled that section 34 of the *Commonwealth Carriers' Liability Act* should be construed harmoniously with Article 29, the State legislature by adopting section 34 plainly intended that section 34 would operate as a State law. It is not correct to describe the choice by the Commonwealth or New South Wales Parliaments as being to implement obligations under international conventions, because in this case, relevantly, the New South Wales Parliament determined that section 34 of the *Commonwealth Carriers' Liability Act* would operate as State law.

53. The primary judge at [76] evidently placed weight on the fact that the respondent knew that the appellant was making a claim in the Federal Court for damages within two years of the accident. That is irrelevant to the operation of section 34 of the *Commonwealth Carriers' Liability Act*. Section 34 does not involve any concept of discoverability or knowledge, and there is no extension of time provision.

54. The primary judge's finding at [80], with respect, misunderstands the effect of the decisions of this Court in *Agtrack* and *Air Link v Paterson* (2005) 223 CLR 283, and the intention of the State Parliament in incorporating section 34 into the *State Carriers' Liability Act*.

55. As to the effect of the decisions in *Agtrack* and *Air Link*, it is not correct to describe those decisions as involving the exercise of discretion by a Court. A proper understanding of those decisions suggests the contrary. The first issue before this Court in *Agtrack* was whether the statement of claim was sufficient to invoke rights under the *Commonwealth Carriers' Liability Act*: see [12]. This Court found that the statement of claim sufficiently pleaded a case under the *Commonwealth Carriers' Liability Act* and that the action therefore was not extinguished by section 34. However, that issue was divorced from the second issue considered by this Court, described at [14] of the judgment of the plurality. That second issue was whether, if the plaintiff had not brought an action within two years of the accident, the Supreme Court of Victoria was authorised to permit amendments to the pleadings to place beyond doubt the plaintiff's reliance

upon the *Commonwealth Carriers' Liability Act*, notwithstanding the terms of section 34. On that second question, the plurality found that "… *if an action was not brought by Mrs Hatfield or for her benefit within the two-year period required by s 34, what ensued was not the expiry of a relevant period of limitation, but the removal of a prerequisite for the existence of the rights sought to be litigated. In those circumstances, s 79 did not operate to 'pick up' the Victorian provision*": at [59].

56. That reasoning is not consistent with the description by the primary judge of the decisions in *Air Link* and *Agtrack* at [80] of her Honour's reasons. For similar reasons that the plurality answered the second question "*no*" in *Agtrack*, section 34 of the *Commonwealth Carriers' Liability Act* operates inconsistently with section 11(2) and/or (3)(b) of the *State Jurisdiction Act*. That is so, because, in effect, section 11(2) and (3)(b) of the *State Jurisdiction Act* permits the Supreme Court, by the exercise of a discretion, to permit a new proceeding for damages under the *State Carriers' Liability Act* to be brought more than two years after the time stipulated in section 34. That is inconsistent with the operation of section 34, which is an extinguishment provision. It is also inconsistent with a central purpose behind section 34, to achieve uniformity by excluding resort to rules of domestic law.

57. The primary judge's reasoning achieves the opposite effect to that intended by the State Parliament in incorporating section 34 of the Commonwealth *Carriers' Liability Act* as State law. Instead of the commencement of proceedings within two years operating as a condition precedent to suit and the cause of action forever being destroyed if that condition precedent is not fulfilled, the effect of the primary judge's reasoning is to permit, by the exercise of a discretion by a State court, a new proceeding to be commenced after the expiration of the period in section 34. For those reasons, section 11(2) and (3)(b) are inconsistent with section 34 of the *Commonwealth Carriers' Liability Act*.

Whether section 34 prevails over sections 11(2) and 11(3)(b)

58. Section 6A(1) of the *State Carriers' Liability Act* provides that "*It is the intention of Parliament that the applied provisions should be administered and enforced as if they were provisions applying as laws of the Commonwealth instead of being provisions applying as laws of the State.*" Section 6A was considered by the Court of Appeal of New South Wales in *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312 (***South West Helicopters***). Basten JA held (at [154]) that "*The effect of [section 6A] is to require that the applied provisions prevail over State laws with which they are*

inconsistent."[12] The effect of that construction is that, if section 34 of the *Commonwealth Carriers' Liability Act* operating as State law is inconsistent with another State provision, section 34 of the *Commonwealth Carriers' Liability Act* prevails over that other State provision, in this case, sections 11(2) and 11(3)(b).

59. This conclusion might be thought to be inconsistent with the decision of the Court of Appeal in New South Wales in *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 (***Proctor***). In *Proctor*, an amendment to the pleadings was sought after the two-year anniversary of the accident, to plead reliance upon the *State Carriers' Liability Act*. The amendment was allowed under the relevant provisions of the *Supreme Court Rules* (which had come into effect after the *State Carriers' Liability Act*), notwithstanding section 34 of the *Commonwealth Carriers' Liability Act*.

60. However, as this Court held in *Air Link* (at [18]) "… *there may be difficulties in accommodating the reasoning in Proctor to [section 6A(1)]*". Section 6A had *not been enacted at the time of Proctor*. This Court in *Air Link* left the construction of section 6A(1) of the *State Carriers' Liability Act* to another occasion where it may be immediately relevant.

Part VII: Time

61. It is estimated that 1.5 hours will be required for the presentation of the respondent's oral argument.

Dated: 23 June 2022

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[12] See also Leeming JA [270] and Basten JA [154].

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

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

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

	Description	**Version**	**Provision(s)**
1	*Administrative Appeals Tribunal Act 1975* (Cth)	Current compilation (18 February 2022 to date); Compilation No 91 (1 January 1998 to 12 October 1999)	Sections 44, 45
2	*Administrative Decisions (Judicial Review) Act 1977* (Cth)	Current compilation (9 December 2021 to date)	N/a

3	*Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (Cth)	Compilation No 53 (commenced on 15 March 1995)	Section 16(1)
4	*Civil Aviation (Carriers' Liability) Act 1959* (Cth)	Compilation No 29 (21 October 2016 to 16 June 2021)	Section 34
5	*Civil Aviation (Carriers' Liability) Act 1967* (NSW)	Current version (1 December 1996 to date)	Sections 4, 5 and 6A
6	*Federal Courts (Consequential Provisions) Act 2000* (NSW)	Act No 80 (version 23 November 2000 to 21 July 2003)	N/a
7	*Federal Courts (State Jurisdiction) Act 1999* (NSW)	Current version (1 July 2013 to date)	Sections 1, 6-10, 11
8	*Freedom of Information Act 1982* (Cth)	Current compilation (1 April 2022 to date)	N/a
9	*Judiciary Act 1903* (Cth)	Current compilation (18 February 2022 to date)	Section 78B
10	*Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW)	Current version (8 January 2010 to date); Act No 125 (version commenced on 1 July 1988)	Section 4 (by way of example)
11	*Jurisdiction of Courts Legislation Amendment Act 2000* (Cth)	Current compilation (30 May 2000 to date)	N/a
12	*Marine Safety Act 1998* (NSW)	Current version (26 March 2021 to date), section 9K(4) inserted by 2012 No 90, Sch 1 [7]	Section 9K(4)
13	*Ombudsman Act 1976* (Cth)	Current compilation (4 September 2021 to date)	N/a

14	*Poisons and Therapeutic Goods Act 1966* (NSW)	Current version (30 May 2018 to date), section 33E(4) amended by 1999 No 76, Sch 2 [6]	Section 33E(4)
15	*Privacy Act 1988* (Cth)	Current compilation (1 April 2022 to date)	N/a