HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Sep 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S60/2022
File Title:	Page v. Sydney Seaplanes Pty Ltd trading as Sydney Seaplanes
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondent
Date filed:	13 Sep 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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 OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions intended to be advanced in oral argument

2. **Common ground.** It is common ground that the order of Griffiths J dismissing the Appellant's claim fell within the literal meaning of "*relevant order*" in s.11 *State Jurisdiction Act*: CA [25] per Bell CJ, and that the Court of Appeal's statement of the relevant principles of statutory construction was orthodox: AS [10].

3. **The Court of Appeal's construction.** Bell CJ's conclusion at CA [53] that the want of jurisdiction referred to in the term "*relevant order*" is confined to a want of jurisdiction by reason of the constitutionally invalid conferral of jurisdiction of the kind addressed in *Wakim* involved a departure from the literal words in "*relevant order*". Bell CJ at CA [53] and [58] identified the basis for that departure: the provisions of the *State Jurisdiction Act* as a whole, including the long title; the specific context in which the Act was passed; the policy discerned from the provisions in the Act; and the extrinsic materials. Bell CJ found that those matters shed a particularly clear light on the relevant statutory purpose.

4. **Bell CJ's construction is correct for the reasons he stated at CA [43]–[58]:** see also RS [11]. Further, the significance which Bell CJ properly attaches to the use of the words "*purports or purported*" in the definition of "*State matter*" is also explained by Leeming JA at CA [110]–[115].

5. **The appellant's construction of "*relevant order*" would produce capricious outcomes.** Leeming JA at CA [120] concludes, correctly, that the "*want of jurisdiction*" referred to in "*relevant order*" is subject matter jurisdiction. At CA [121]–[129], Leeming JA refers to different factual scenarios where the Federal Court may not have subject matter jurisdiction, and observes that in only *some* of those

situations the dismissal would fall within the definition of "*relevant order*", on the appellant's construction. There is no rationale to explain why the legislature would have intended that only some of those orders would fall within the definition of "*relevant order*".

6. Further, as Leeming JA says at CA [142], the creation of a retrospective fictional proceeding is "*no small thing*" or an "*extreme measure*". There is a clear rationale behind that measure to provide a safety net to litigants who had commenced proceedings relying on what was thought to be a constitutionally valid conferral of jurisdiction. There is no such rationale to justify such a measure for all litigants who misguidedly commence proceedings in the Federal Court of Australia without first considering the issue of jurisdiction.

7. **The appellant's textual arguments should be rejected.** The appellant relies on the inclusion of legislation enacted after the decision in *Wakim* in the definition of "*relevant State Act*" to support his wider construction: AS [17]. Whilst there is considerable detail in the various Acts included in that definition which is not addressed by the primary judge or the Court of Appeal (the appellant's argument on appeal was not advanced below), the Acts included in the definition of "*relevant State Act*" are all New South Wales Acts which (with the exception of the *Jurisdiction of Courts (Cross-vesting) Act* apply Commonwealth laws. The inclusion of each of those Acts supports the construction of the Court of Appeal: RS [21]–[23].

8. The appellant also relies on the first and fourth limbs of the definition of "*State matter*" to support his wider construction: AS [18]. The first limb of that definition provides no support to the appellant – it follows the definition in each State's *Jurisdiction of Courts (Cross-vesting) Act*, and plainly was included to address the constitutional invalidity of those provisions arising in the decision in *Wakim*: RS [24].

9. As to the appellant's reliance on the fourth limb of the definition of "*State matter*", whilst not addressed by the primary judge or the Court of Appeal (again, this argument was not put below), this limb seeks to address a scenario in which purported conferrals of jurisdiction arose by the application of Commonwealth administrative laws as State laws within the applied law schemes.

Notice of Contention

10. **The nature of section 34 *Commonwealth Carriers' Liability Act*.** Section 34 is an extinguishment provision, or a condition precedent to suit: RS [42]–[49]. A central

purpose behind section 34 is to achieve uniformity of international aviation rules by excluding resort to rules of domestic law: RS [48]–[49]. Section 34 should be construed harmoniously with Article 29 of the *Warsaw Convention*: RS [45]. The authors of *Shawcross and Beaumont, Air Law* (at VII-236 SBAL, Issue 176) state that Article 29(2) refers to the *lex fori* "*only such questions as whether a year means 12 calendar months or 365 days, or whether parts of a day are disregarded and precisely what procedural steps are to be treated as bringing the action.*"

11. **The effect of s.11(2)/11(3)(b) is inconsistent with s.34.** The effect of s.11(2) *State Jurisdiction Act* is that, by the exercise of a discretion by the Supreme Court, a new proceeding may be brought after the expiration of two years from the date of the accident: *Residual Assco* at [27] (JBA vol 3C, pg 646). That new proceeding is linked to the dismissed Federal Court proceeding but operates independently of that dismissed proceeding (*Residual Assco* at [25]). The true inconsistency question is posed by *Khan v Trans World Airlines* (1981) 443 NYS 2d 79 (extracted in *Agtrack* at [50] (JBA vol 3C, pg 441) – whether the appellant, by the filing of an action in the Federal Court within two years of the accident had "*taken the necessary measures … to invoke that particular court's jurisdiction over the action*". The exercise of the discretion in s.11(2) in the circumstances is inconsistent with the extinguishment regime in s.34 in the sense that it detracts or impairs the operation of that regime because (1) the filing of an action in a court with no jurisdiction to hear it is not a necessary measure to invoke that court's jurisdiction, and (2) even if it was, the commencement of an action in the Federal Court within two years was not sufficient to invoke the Supreme Court's jurisdiction within that period.

12. **Section 34 operating as State law should prevail over s.11(2) and 11(3)(b).** Section 6A of the *State Carriers' Liability Act* (RS [58]) was considered by the Court of Appeal in *South West Helicopters* (JBA vol 4D, pg 781). 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*."

Dated: 13 September 2022

David Lloyd Courtney Robertson